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Supreme Court, U.S.
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No. 08-837

In The

Supreme Court Of the United States

DONALD BEUCKE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.

Respondent.

On Petition for A Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 18 U.S.C.§ 3500 (the "Jenks Act") exempt production of investigative reports prepared by the Secretary of the United States Department of Agriculture (the "Agency") for use in a "responsibility connected" hearing under 7 U.S.C. § 499a(b)(9) of the Perishable Agriculture Commodities Act ("PACA").
2. Does the doctrine under Brady v. Maryland, 373 U.S. 83 (1963) and the Due Process Clauses of the U.S. Constitution, Amendments V and XIV, require the production of potentially exculpatory investigative reports prepared by an Agency witness.
3. Do the Due Process Clauses of U.S. Constitution, Amendments V and XIV, require that a party subject to a "responsibility connected" hearing pursuant to 7 U.S.C. § 499a(b)(9) of PACA be afforded the following rights: (i) written notice of the underlying disciplinary proceeding against

the licensee or business entity for which that party was purportedly "responsibly connected"; (ii) an opportunity to correct the violations committed by licensee or business entity; and/or that (iii) the disciplinary proceeding against the licensee or business entity be joined with the "responsibility connected" proceeding against that party.

CORPORATE DISCLOSURE STATEMENT

There is no disclosure to be reported pursuant to Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Donald Beucke, by and through undersigned counsel, respectfully petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

DECISIONS BELOW

A. Administrative Proceedings Before The Agency.

The procedural background of the case is as follows. A disciplinary complaint was filed against Bayside Produce ("Bayside") on April 26, 2004, by the Agency, alleging that Bayside had willfully, flagrantly and repeatedly violated PACA by failing to pay numerous produce creditors from November 23, 2002 through February 7, 2003 (the "violations period"). Bayside failed to respond to the complaint. A Decision Without Hearing By Reason of Default was issued against Bayside on August 24, 2004 (the "Bayside Decision"), finding that Bayside had engaged in willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). See App. 13-18. The Bayside Decision became final 35 days after service, and effective

11 days after such decision became final.

In the interim, on May 12, 2004, about two weeks after the Bayside matter was filed, the Agency made an initial determination that Petitioner Donald Beucke was "responsibly connected" to Bayside during the violations period. Petitioner Beucke contested this determination. See App. 19-23.

The PACA Branch Chief subsequently made a "final determination" on August 17, 2004 that Mr. Beucke was "responsibly connected" to Bayside. See App. 24-28. On August 23, 2004, a petition for review of such determination was prepared for Mr. Beucke and received by the Agency on August 25, 2004. The Agency elected not to join Petitioner Beucke's "responsibly connected" proceeding with the underlying disciplinary proceeding against Bayside, as required by 7 C.F.R. § 1.137, but instead kept the matters separate.

The hearing on Petitioner Beucke's "responsibly connected" proceeding took place on October 12 and 13, 2005, in San Jose, California before Administrative Law Judge Peter M. Davenport.

Subsequent to the hearing, Judge

Davenport issued an Order dated November 17, 2005 (the "Nov. Order"), denying Petitioner Beucke's Motion for Reconsideration of his ruling during hearing whereby he refused to require the Agency to produce its investigation report to Petitioner Beucke, or to re-open the evidentiary portion of the administrative proceeding for questioning concerning the report. See App. 29-34.

Next, Judge Davenport issued a Decision and Order dated December 20, 2005 (the "Dec. Decision"). See App. 35-56. The Dec. Decision concluded that Petitioner Beucke was "responsibly connected" to Bayside during the violations period.

Thereafter, on January 20, 2006 Petitioner appealed the Dec. Decision to the Agency's Judicial Officer. On November 8, 2006, the Agency, through Judicial Officer William G. Jenson (the "Judicial Officer"), issued the final order (the "Final Order") affirming the decision of Judge Davenport. See App. 57-135. The Final Order concluded that Petitioner Beucke was "responsibly connected" to Bayside during the violations period, and ordered that Petitioner Beucke be subject to licensing and employment restrictions. (7 U.S.C. §§ 499d(b), 499h(b)). The

Final Order is the subject of the appeal before the Ninth Circuit Court of Appeals.

B. The Decision Of The Ninth Circuit Court of Appeals.

The decision of the United States Court of Appeals for the Ninth Circuit was entered on August 6, 2008 ("Ninth Circuit Decision"). See App. 136-143.

Petitioner Beucke appealed to the Ninth Circuit from two separate decisions by the Agency affirming the Agency's administrative law judge's determination that Mr. Beucke was "responsibly connected" under 7 U.S.C. § 499a(b)(9)("PACA") with respect to two separate business entities, i.e., Garden Fresh Produce ("Garden Fresh") and Bayside. The Ninth Circuit consolidated Mr. Beucke's appeal relating to Garden Fresh (9th Circuit Case Number 06-75358) with the Mr. Beucke's appeal relating to Bayside (9th Circuit Case Number 07-70033).

With respect to the Garden Fresh case, the Ninth Circuit ruled that the Judicial Officer's decision that Mr. Beucke was "responsibly connected" to Garden Fresh was not supported by substantial evidence (See App. 141-142), and on that basis, the Ninth Circuit granted Mr.

Beucke's petition with respect to Garden Fresh. See App. 143. The Garden Fresh ruling is not the subject of this petition before the U.S. Supreme Court.

In contrast, with respect to the Bayside Case, the Ninth Circuit ruled that the Judicial Officer's decision that Mr. Beucke was "responsibly connected" to Bayside was supported by substantial evidence. See App. 140-142.

In addition, in its decision with respect to Bayside, the Ninth Circuit declined to rule on whether or not the Agency's refusal to provide Mr. Beucke with a copy of an investigative report prepared by a government witness constituted a violation of 18 U.S.C.§ 3500 (the "Jenks Act"). See App. 142-143. Instead, the Ninth Circuit ruled that "even if there was a Jenks Act error, it was harmless, because the Secretary did not base its responsibly connected decision on the information in the [investigative] report", and *citing to* Blackfoot Livestock Com'n v. Department of Agr. 810 F. 2d 916, 923 (9th Cir. 1987). See App. 142-143. Petitioner Beucke disputes that the Jenks Act error constituted "harmless error", as will be discussed below.

Moreover, in its decision with respect to Bayside, the Ninth Circuit did not address Mr.

Beucke's argument as to whether or not the doctrine under Brady v. Maryland, 373 U.S. 83 (1963) and the Due Process Clauses of the U.S. Constitution, Amendments V and XIV, require the production of the Investigative Report as potentially exculpatory evidence.

Furthermore, in its decision with respect to Bayside, the Ninth Circuit recognized that Mr. Beucke had presented various other due process violations relating to his "responsibly connected" hearing (See App. 143), although such items were not itemized in the Ninth Circuit Decision.

Mr. Beucke itemized those other due process violations in his briefs to the Ninth Circuit, which violations are comprised of the following: (i) failure of the Agency to provide Mr. Beucke with written notice of the underlying disciplinary proceeding against Bayside for which Mr. Beucke was purportedly "responsibly connected"; (ii) failure of the Agency to provide Mr. Beucke with an opportunity to correct the violations committed by Bayside; and (iii) failure of the Agency to join the disciplinary proceedings against the licensee or business entity with the "responsibility connected" proceeding against Mr. Beucke.

With respect to these items, the Ninth

Circuit held that Mr. Beucke had no right to any of the procedures he pointed to, *citing to* Kleiman & Hochberg, Inc. v. Dep't of Agric., 497 F. 3d 681, 691 (D.C. Cir. 2007), at n. 7. See App. 143. Petitioner Beucke disputes that he had no right to these various procedures.

Consequently, Petitioner Beucke requests that the United States Supreme Court grant Petitioner Beucke certiorari with regard to the issue of the proper interpretation of the Jenks Act, as well as to his rights to the other due process procedure cited above.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on August 6, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of 18 U.S.C.§ 3500 (the "Jenks Act"), Fifth and Fourteenth Amendment to the United States Constitution, and the interpretation of 7 U.S.C. § 499a(b)(9) of PACA, as well as various federal regulations promulgated under PACA. The above

mentioned provisions are reproduced in the Appendix at App. 1-12.

STATEMENT OF THE CASE

A. Facts Relating To The Denial Of Petitioner's Request For A Copy of The Agency's Investigative Report Prepared By A Government Witness.

At the "responsibly connected" proceeding, the Agency presented the testimony of two PACA employees, Investigator, Evert Gonzalez, and Senior Marketing Specialist, Phyllis Hall.

During Mr. Gonzalez's direct examination he testified generally regarding his investigation of Bayside. Mr. Gonzalez testified regarding his review of voluminous records from Bayside, his discussions with Mr. Wayne Martindale (the other shareholder and officer of Bayside), and his contacts and attempted contacts with other individuals.

Mr. Gonzalez purported to have specific recollections regarding statements allegedly made by Mr. Martindale, which, if accurately remembered and truthful, would tend to suggest that Petitioner Beucke had a role in the

operations of Bayside during the violations period. Mr. Gonzalez also purported to have specific recollections regarding the content of Bayside documents he reviewed during his interview with Mr. Martindale.

Mr. Gonzalez further testified on direct examination that he had scheduled a meeting with Mr. Martindale in May of 2003 in Las Vegas, Nevada, but that Mr. Martindale failed to appear for the initially scheduled meeting. Mr. Gonzalez testified that he later made contact with Mr. Martindale and did ultimately conduct an interview several days later.

On cross-examination Mr. Gonzalez acknowledged that he had never attempted to verify with any PACA produce creditors who had filed complaints with the Agency as to whether or not Mr. Beucke was responsible for produce payments for Bayside. He also admitted that he never made any attempts to interview Mr. Beucke. Thus, Mr. Gonzalez made no attempts to confirm any of the self-serving statements made by Mr. Martindale against Mr. Beucke.

Mr. Gonzalez did acknowledge that he had some notes of his meeting with Mr. Martindale, and that he had brought "partial notes" to the trial. Counsel for Petitioner Beucke requested an

opportunity to review the partial notes for the purpose of using the statements to conduct cross-examination. Respondent did not object and Petitioner's request was granted. Mr. Gonzalez complied, producing two scant pages of notes related to his interview of Mr. Wayne Martindale and his investigation of Bayside. Counsel for Petitioner took a brief recess, reviewed the notes and then questioned Mr. Gonzalez regarding the notes.

An examination of the notes revealed that one of the pages of notes appeared to be merely a hand-written copy of the other, with virtually identical content. The notes were dated 8/21. Further, even though the content of the notes was minimal, the notes appeared to be inconsistent with the content of Mr. Gonzalez's direct examination testimony. On cross-examination, Mr. Gonzalez was asked to explain the 8/21 date on the notes, given that he had testified on direct examination that he conducted the interview with Wayne Martindale in May of 2003. Mr. Gonzalez could offer no explanation and admitted that he was unclear when the interview occurred and when the notes were written. Mr. Gonzalez was even unsure as to whether the 8/21 date referred to 2002 or 2003, despite the fact that none of

Bayside's PACA violations occurred until November 2002.

On cross-examination, Mr. Gonzalez also revealed that Mr. Martindale failed to appear for his scheduled initial meeting because Mr. Martindale was in jail. Mr. Gonzalez acknowledged speaking to Mr. Martindale's attorney regarding this issue, but Mr. Gonzalez was uncertain as to the specifics of this conversation.

At the administrative hearing, numerous other witnesses testified that Wayne Martindale's unexpected and rapid demise related to his newly developed drug and gambling problems, which occurred when he was having marital problems, and shortly after the death of his father, with whom he was very close. Various witnesses surmised that Mr. Martindale's personal problems enumerated above caused Bayside's violations of PACA, due to Mr. Wayne Martindale's illicit use of PACA funds. Other witnesses at the administrative hearing and physical evidence presented at the hearing also contradicted the statements allegedly made by Mr. Wayne Martindale, as relayed by Mr. Gonzalez.

During the cross-examination of Mr.

Gonzalez, he also revealed that he had written a Report of Investigation (the "Report"), that he had not brought with him, but which he had been provided to counsel for the Agency. Mr. Gonzalez testified that there was nothing in the Report which was not related to the subjects to which he had testified on direct examination.

At that time, counsel for Mr. Beucke asked the Agency to produce the Report for examination by Mr. Beucke's counsel. The Agency refused. Counsel then asked Judge Davenport to order the Agency to deliver a copy of the Report to Mr. Beucke's counsel, because it constituted a statement of a government witness related to the subject matter of the witness' testimony. The request was made subsequent to Mr. Gonzalez's direct examination testimony, and while Mr. Gonzalez was still available for cross-examination. The request was made specifically for the purpose of using Mr. Gonzalez's prior statements to conduct cross-examination of Mr. Gonzalez. Judge Davenport, over Mr. Beucke's objection, refused to order the Agency to produce the Report. Judge Davenport also refused, over Mr. Beucke's objection, to order Respondent to produce the Report for in-camera examination.

However, Judge Davenport subsequently

agreed to reconsider his rulings on these matters upon further briefing stating the specific bases for Petitioner's request, and identifying the legal bases supporting disclosure of the Report. Mr. Beucke's counsel made it clear that Petitioner needed an immediate ruling, since the purpose for which the Report was sought was for use during cross-examination of the Agency's witnesses. Judge Davenport made it clear that his immediate ruling was to deny Petitioner Beucke's request for disclosure of the Report, but that he was still requesting a further briefing of the issues.

In response, Petitioner Beucke submitted his Motion For Reconsideration, which was then responded to by the Agency. Judge Davenport then issued an Order confirming his rulings at hearing in favor of the Agency.

B. Facts Relating To The Agency's Due Process Violations Under The Fifth And Fourteenth Amendment With Regard To The Underlying Disciplinary Proceeding.

The Agency violated Petitioner Beucke's rights under the Due Process Clauses of the United States Constitution with regard to the

underlying disciplinary proceeding against Bayside by: (i) failing to provide Petitioner Beucke with written notice of the proceeding against Bayside, (ii) failing to provide Petitioner Beucke with an opportunity to correct the violations committed by Bayside, and (iii) failing to join the proceeding against Bayside with the proceeding against Petitioner Beucke.

The Agency failed to provide Petitioner Beucke with timely notice of each of the administrative actions against Bayside. The Agency did not notify Petitioner Beucke of reparation proceedings against Bayside by Varsity Produce Sales Inc., Main Street Produce, Inc. and Robert Villalobos, until August 27, 2003, approximately a month after default orders had been entered against Bayside.

The Agency also failed, prior to instituting the formal disciplinary proceeding against Bayside, on April 26, 2004, to provide Petitioner Beucke with written notice of the facts involved and to provide him an opportunity to correct Bayside's PACA violations, as required by 7 C.F.R. 1.133. Instead, the Agency chose to wait until May 12, 2004 to send a courtesy copy of the disciplinary complaint against Bayside to Petitioner Beucke's counsel.

The Agency elected not to give Petitioner Beucke timely notice of these proceedings despite the fact that the Agency knew how to contact Petitioner Beucke, and in fact was in regular contact with Petitioner Beucke's counsel. The Agency also elected not to give Petitioner Beucke timely notice of these proceedings, knowing that Bayside no longer received mail at the addresses to which the Agency was mailing the formal notices. Not only was mail sent to Bayside being returned as undeliverable, but the Agency's investigator, Mr. Gonzalez, testified that he knew that as of May 2003 Bayside was no longer located in Salinas, California, and in fact was no longer in operation. In sum, the Agency's conduct was not reasonably calculated to appraise Mr. Beucke of the pending administrative actions against Bayside.

The Agency also failed to inform Petitioner Beucke that the action against Bayside would affect Petitioner Beucke's personal interests and his right to future licensure and continued employment. Although the Agency did enclose a courtesy copy of the disciplinary complaint against Bayside in its letter of May 12, 2004 to Petitioner Beucke's counsel, such notice did not state that the outcome of that proceeding would

substantially affect Petitioner Beucke's rights, including his rights to resolve claims with the Bayside PACA creditors, in order to avoid future employment and licensing restrictions. As such, the Agency's notice to Petitioner Beucke was wholly insufficient.

The Agency never informed Petitioner Beucke that he was a party to the Bayside action. The Agency never informed him that he had the right or obligation to participate in the action against Bayside, even though he had previously resigned all of his positions and involvement with Bayside. The Agency never informed him that entry of judgment against Bayside would preclude him from entering a consent decree, which would allow him to avoid any potential penalties related to the "responsibly connected" proceeding. The Agency never joined Mr. Beucke's "responsibly connected" proceeding with the disciplinary proceeding against Bayside as required by 7 CFR 1.137. The Agency never informed Petitioner Beucke that Bayside had failed to respond to the disciplinary complaint. The Agency failed to serve the proposed default order against Bayside upon Petitioner Beucke prior to entry of judgment as required by 7 CFR 1.139.

As a result of this conduct by the Agency, Petitioner Beucke was unaware that he would lose substantial rights as a result of the Bayside Decision. Particularly, Petitioner Beucke was unaware that he would lose the right to avoid any employment or licensing prohibitions by repaying Bayside's creditors once the Bayside Decision was entered, due to an internal Agency policy.

Moreover, the Agency failed to inform Petitioner Beucke of the process afforded him to present his objections with regard to the April 26, 2004 disciplinary action against Bayside. The Agency also failed to advise Petitioner Beucke of his right to participate in the action against Bayside and it failed to advise Petitioner Beucke of the procedure through which he could present his objections. Specifically, Petitioner Beucke was not named as a party to the proceeding, nor did the Agency afford Petitioner Beucke any of the notification rights that would be afforded to a party. Petitioner Beucke was not informed of the need for him to respond to the allegations against Bayside, nor the time period for filing such a response. Petitioner Beucke was not informed of his right to intervene in the action against Bayside, nor was he provided information regarding how to do so. Petitioner Beucke was

not informed of his right to a hearing as to Bayside's liability; nor was he informed how to obtain such a hearing. Petitioner Beucke was not informed that a default decision would be entered against Bayside, if he did not respond to the complaint, nor was he informed that the Agency had requested a default order.

REASONS FOR GRANTING THE PETITION

A. The Agency And The Ninth Circuit Appellate Court Have Misinterpreted 18 U.S.C.§ 3500(the "Jenks Act") As Exempting Production Of Investigative Reports By The Agency For Use In "Responsibly Connected" Hearings Under 7 U.S.C. § 499a(b)(9) of the ("PACA").

Petitioner Beucke will first address whether or not there is an exemption to the production for the Investigative Report in a "responsibly connected" proceeding, and then whether or not it was "harmless error" for the Agency to fail to produce the Investigative

Report.

1. Interpretation Of The Jenks Act.

Petitioner Beucke was clearly entitled to an order requiring Respondent to produce the Report after Mr. Gonzalez testified on direct examination. PACA Rules of Practice for Disciplinary Hearings Sec. 1.141(h)(1)(iii) [7 C.F.R. § 1.141(h)(1)(iii)] states:

> "After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the **limitations prescribed in the Jencks Act (18 U.S.C. 3500)**."

[Emphasis Added].

In this case, all of the prerequisites to disclosure of the Report under Sec. 1.141(h)(1)(iii) and the Jencks Act had been satisfied when the

court denied Petitioner Beucke's request for an order compelling the Agency to produce the Report.

First, Mr. Gonzalez had testified as a witness on direct examination. Second, Mr. Gonzalez wrote the Report regarding Bayside which constituted a "statement" of Mr. Gonzalez. Third, Mr. Gonzalez testified that he had a copy of the Report, had not brought it with him to court, but had provided it to the Agency's counsel. Therefore, the Report was in the Agency's possession. Fourth, Mr. Gonzalez testified that the Report related to the same subject matter of his testimony. Fifth, Petitioner Beucke's request was properly limited in scope, was made for a proper purpose and was timely, and did not seek any legal conclusions, opinions, interpretation or legal analysis that may have been made by Mr. Gonzalez or others. Rather Petitioner sought factual information that would assist in impeaching the reliability of Mr. Gonzalez's limited independent recollection of his investigation, the content of the documents he examined, the specifics of his interview of Mr. Martindale and the notification or lack of notification of Petitioner Beucke regarding the investigation and action against Bayside. Under

these facts, it was error for the court to refuse to order the Agency to produce the Report to Petitioner.

Further, the Jencks Act and cases interpreting the Jencks Act contain no limitations which would justify non-disclosure of the Report. The Jencks Act, 18 U.S.C. 3500, provides in pertinent part:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his

examination and use.

(c) "If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in-camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statements to the defendant for his use. If pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and trial is continued to an

> adjudication of guilt of the defendant, the entire test of such statements shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge...
>
> (e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means –
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him ..."

Despite the fact that the Report clearly constituted a discoverable statement, the Agency argued that the Machado decision created a per se rule exempting PACA investigation reports from production. Miguel A. Machado and G.L.

"Bud" Cozzi, 42 Agric. Dec. 820 (1983). However, such an interpretation of Machado is simply inaccurate.

In fact, Machado held that where there is a proper request for statements of a government witness contained in an investigation report, such statements would be producible. Machado, supra, at 854. Machado ruled only that Machado's counsel had not properly requested information that was subject to disclosure under the Jencks Act, and thus the opinion was based solely upon the impropriety of the request. Machado, supra, at 839 and 854. Machado ruled that the investigation report was not discoverable because the request for information was not timely, was not properly limited in scope and was not made for a proper purpose. Here, in contrast, Petitioner Beucke's request was timely, properly limited in scope and for a proper purpose.

It is important to note that the government's witness in Machado was merely an auditor, who testified only for the purpose of laying foundation for documents being presented into evidence by the government. Machado, supra, at 825. This is in sharp contrast to the testimony of Mr. Gonzalez in this case. Here, Mr. Gonzalez testified regarding his personal

investigation of the allegations against Bayside, his gathering of documents, his interview of witnesses and his efforts to obtain information regarding the individuals associated with Bayside.

It should also be noted that the witness statement must be produced under the Jencks Act even if it is not inconsistent with the witness' testimony. Campbell v. United States, 373 U.S. 487, 497 n. 13 (1963); Palermo v. United States, 360 U.S. 343, 353 n. 10 (1959); United States v. Smaldone, 544 F.2d 456, 460 (10th Cir. 1976), cert. denied, 430 U.S. 967 (1977); and see Jencks v. United States, 353 U.S. 657, 667 (1957). Similarly, in determining producibility under the Jencks Act, it is immaterial, whether or not the statement is admissible as evidence in the proceeding. Palermo v. United States, 360 U.S. 343, 353 n. 10 (1959). It should be further noted that the mandatory disclosure of the investigation report to Petitioner Beucke under Sec. 141(h)(1)(iii) and the Jencks Act is in no way dependent upon any showing that the information contained within the Report is exculpatory.

Finally, because the Agency has made no claim that any portion of the Report did not relate

to the subject matter of Mr. Gonzalez's testimony, there was no need for the court to conduct an in-camera inspection as provided for in subsection (c) of the Jencks Act. Instead, the Agency should have simply delivered the Report directly to Petitioner Beucke's counsel.

2. The Jenks Act Error Was Not Harmless Error Because The Judicial Officer Was Required To Review The Investigative Report And Produce It To Mr. Beucke, But Did Not Do So.

As noted earlier, in its decision with respect to Bayside, the Ninth Circuit declined to rule on whether or not the Agency's refusal to provide Mr. Beucke with a copy of an investigative report prepared by a government witness constituted a violation of 18 U.S.C.§ 3500 (the "Jenks Act"). Instead, the Ninth Circuit ruled that "even if there was a Jenks Act error, it was harmless, because the Secretary did not base its responsibly connected decision on the information in the [investigative] report", and *cited* Blackfoot Livestock Com'n v. Department of Agr. 810 F. 2d 916, 923 (9th Cir. 1987).

a. **The Judicial Officer Failed To Conduct An In Camera Inspection Of The Report under Section 3500(c), And Alternatively, Failed To Strike The Report From The Record Under Section 3500(d).**

Section 3500(c) of the Jencks Act reads in relevant part: "If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court **shall** order the United States to deliver such statement for the inspection of the court in-camera." [emphasis added]. Here, it is undisputed that the Agency argued that the Report did not contain relevant material. Consequently, the Judicial Officer was required to conduct an in-camera inspection of the Report to determine its relevancy, Alternatively, the Judicial Officer was required to strike the Report from the record under Section 3500(d) of the Jenks Act ("the court shall strike from the

record"). However, the Judicial Officer did neither.

b. The Agency Engaged In Circular Reasoning In Arguing That The Report Was Not Important To The Judicial Officer's Determination Since The Judicial Officer Never Reviewed The Report.

In the Ninth Circuit proceedings, the Agency inexplicably argued that the Report was not used by the Judicial Officer in his finding that Petitioner was responsibly connected since he did not in fact hold an in-camera review to determine its relevancy. This is circular reasoning. As noted above, the Judicial Officer was required to review the Report, but failed to do so. It was this failure, along with the failure to produce the Report to Petitioner, that constitutes error as a matter of law. Consequently, it was not in fact "harmless error" to fail to review the Report and subsequently produce the Report to Mr. Beucke.

c. The *Blackfoot* Case Establishes That Failure To Conduct An In-Camera Inspection Is Reversible Error Where The Witness Is A Government Witness.

Moreover, in Blackfoot Livestock Com'n v. Department of Agr. 810 F. 2d 916, 923 (9th Cir. 1987), the Ninth Circuit recognized that failure to conduct an in-camera inspection where the witness is a government witness is reversible error. The Court held:

> "Although trial courts should generally conduct an in camera inspection before concluding that documents are not Jencks Act material, failure to do so is not always reversible error, especially if the requested materials are not in fact 'statements' of government witnesses. [citations omitted] Only statements of a **government witness that relate to that witness's testimony must be**

disclosed."

Section 3500(e) of the Jencks Act reads as follows: "the term 'statement' in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means – a written statement made by said witness and signed or otherwise adopted or approved by him..." Clearly, the Report was a written statement of a government witness. Mr. Gonzalez is a PACA employee and PACA Investigator and was called to testify by the Agency.

Consequently, the failure of the Judicial Officer to conduct an in-camera inspection, and subsequently produce the Report to Mr. Beucke was clear error. Moreover, the logic adopted by the Ninth Circuit in ruling that the Jenks Act error was "harmless error" is fundamentally flawed as set forth above.

B. The *Brady* Doctrine, Along With The Due Process Clauses Of The Constitution, Require The Production Of Potentially Exculpatory Investigative Reports Prepared By An Agency Witness.

Petitioner Beucke is also entitled to disclosure of the Report, under Brady v. Maryland, 373 U.S. 83 (1963), the Due Process Clauses of the U.S. Constitution, Amendments V and XIV and established USDA policy, to the extent that the Report contained potentially exculpatory material. It is the established policy of the U.S.D.A. to furnish all materials that are in any sense exculpatory to targets of disciplinary actions. Mountainside Butter and Egg Company, 39 Agric. Dec 862, 873 (1980), Miguel A Machado and G.L. "Bud" Cozzi, 42 Agric. Dec 820, 829 (1983). Moreover, Petitioner contends that the Brady Doctrine and Constitutional Due Process both require disclosure of the Report, to the extent that it contains exculpatory information.

No court has yet ruled as to the applicability of the Brady Doctrine to PACA "responsibly connected" proceedings. The judicial officer in Machado refused to apply the Brady Doctrine because of perceived differences between criminal cases and cases under the Packers and Stockyards Act. Those distinctions are inapplicable here. In fact, the facts of this case more closely resemble those of a criminal case. As such, the principals of the Brady Doctrine and Due Process, which require the government to

reveal exculpatory information to the accused, should be applicable here.

There is no question that conduct occurred which lead to the non-payment of PACA creditors by Bayside. That has already been decided. The issue to be determined in this case was who was actively involved in the activities resulting in the violations. Petitioner Beucke presented substantial evidence that Mr. Martindale's conduct caused the violations, i.e., the misappropriation of corporate funds to finance Mr. Martindale's drug and gambling habits. Conversely, the Agency, through Mr. Gonzalez, presented hearsay statements allegedly made by Mr. Martindale, which purported to shift blame to Petitioner Beucke. Obviously, any statements in the Report or elsewhere which would clarify or impeach Mr. Martindale or the testimony of Mr. Gonzalez would be exculpatory evidence.

Second, the judicial officer in Machado found that the Brady Doctrine was inapplicable because in criminal cases the witnesses are unsavory, whereas the witnesses in cases under the Packers and Stockyards Act proceedings are generally reputable citizens. Here, the record contains substantial evidence to indicate that when Mr. Martindale met with Mr. Gonzalez, he

was an unsavory character and no longer a reputable citizen. Numerous witnesses testified that he lied to them and many witnesses testified about his drug and gambling problems. Even, Mr. Gonzalez testified that Mr. Martindale was in jail at the time he was initially scheduled to meet with him.

Third, the judicial officer in Machado found that the Brady Doctrine was inapplicable because most criminal cases are malum in se, whereas most administrative proceedings are malum prohibitum. However, this distinction is inapplicable here. Petitioner Beucke's express contention is that he should not be held responsible for Bayside's non-payment of PACA creditors, because the activity resulting in the violations was solely the unpredictable misappropriation of corporate funds by Mr. Martindale. Clearly, Mr. Martindale's conduct was malum in se.

For each of these reasons, the Agency was required to produce potentially exculpatory material in the Report to Petitioner Beucke under established department policy, the Brady Doctrine and the Due Process Clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution.

C. The Due Process Clauses Of The U.S. Constitution Require That A Party Subject To A "Responsibly Connected" Hearing Pursuant to 7 U.S.C. § 499a(b)(9) Of PACA Be Afforded Certain Rights.

1. Mr. Beucke Should Have Been Afforded The Following Rights: (i) Written Notice Of The Underlying Disciplinary Proceeding Against Bayside; (ii) An Opportunity To Correct The Violations Committed By Bayside; And/Or (iii) Joinder Of The Disciplinary Proceeding Against Bayside With The "Responsibility Connected" Proceeding Against Mr. Beucke.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution (the "Due Process Clause") provides that certain substantive rights such as life, liberty and

property cannot be deprived by government action except pursuant to constitutionally adequate procedures. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Therefore, the first step in any due process analysis is to determine whether the government conduct seeks to impinge upon a constitutionally protected interest. Memphis Light, Gas & Water Division v. Craft, 436 U. S. 1 (1978). Once it is determined that the Due Process Clause applies, the question remains what process is due. Cleveland Board of Education at 542. Finally, the government's conduct must be examined in light of the requirements of the Due Process Clause.

Here, the Agency sought to impose licensure and employment prohibitions upon Petitioner Beucke, pursuant to 7 U.S.C. § 499h(b). The Due Process Clause protects both the right to employment related licensure and the right to continued employment. Courts have long recognized that licenses which allow one to pursue a profession or earn a livelihood are protected property interests under the Due Process Clause. Brown v. Smith (In re: Poole), 222 F.3d 618(9th Cir 2000)(holding that a medical licenses is a protected interest); Dittman v.

California, 191 F.3d 1020 (9th Cir. 1999)(holding that an acupuncture license is a protected interest); Barr v. McGarr, 774 F.2d 777 (7th Cir. 1985)(holding that a license to practice law is a protected interest); Bell v. Burson, 402 U.S. 535, 542 (1971)(holding that a driver's license is a protected interest); Greenwood v. Federal Aviation Administration, 28 F.3d 971 (9th Cir 1994)(holding that a pilot's license is a protected interest).

The United States Supreme Court has also repeatedly held that an individual's interest in retaining employment is a substantial interest, protected by Due Process, and in so finding the Court has repeatedly recognized the severity of depriving a person of the means of livelihood. Fusari v. Steinberg, 419 U.S. 379, 389 (1975); Bell v. Burson, 402 U.S. 535, 542 (1971); Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969). As such, the Due Process Clause places procedural constraints on the actions of government that work a deprivation of such interests. Therefore, it is clear that Petitioner Beucke is entitled to due process protections with regard to this proceeding.

It is also clear that Petitioner Beucke was

entitled to Due Process protections with regard to the underlying administrative proceedings against Bayside, because those proceedings also impacted upon his substantive rights with regard to his future PACA licensure and his continued employment with PACA licensees.

First, the "responsibly connected" proceeding, and any potential penalties to Petitioner Beucke arising therefrom, are wholly predicated and dependent upon the underlying default decisions against Bayside. In the absence of those default decisions, Petitioner Beucke would not be subject to any potential penalties in conjunction with being "responsibly connected". Thus, Petitioner Beucke was entitled to Due Process protections with regard to the underlying proceedings against Bayside, as well as with regard to his own "responsibly connected" proceeding. The Supreme Court reached a similar conclusion, holding that a corporate officer, who was being sued as a representative of the corporation, and in his individual capacity, was entitled to due process protections in both his individual and representative capacities. Donald E. Nelson v. Adams, USA, Inc., 529 US 460 (2000).

Second, Petitioner Beucke was entitled to

Due Process protections with regard to the underlying proceedings against Bayside because he lost substantial rights with regard to his future licensure and employment opportunities the moment that the Bayside Decision was entered. Petitioner Beucke lost the right to enter a "consent decision" with the Agency, pursuant to the Agency's internal administrative policies, and **lost** the right to settle this case.

Specifically, the Agency has a well established, but unpublicized, administrative policy which allows individuals to avoid potential licensure and employment prohibitions under 7 U.S.C. § 499h(b), if the individual or entity fully repays all produce creditors ***prior to the entry of an order against the offending entity***. Such cases are treated as "slow pay" cases, rather than "no pay" cases under the Secretary's policy set forth in In re: Scamcorp, Inc., d/b/a Goodness Greeness, 57 Agric. Dec. 527 (1998). However, once the underlying entity is found to have willfully, flagrantly and repeatedly violated PACA, the case becomes a "no pay" case and the Agency's internal policies preclude entry of a consent decision. Therefore, once default was entered against Bayside, Petitioner Beucke lost the right to avoid a potential employment

prohibition by fully repaying all of Bayside's produce suppliers. This is an important property right, which Petitioner Beucke lost as a result of the underlying action against Bayside.

An essential principal of Due Process is that a deprivation of property be preceded by notice and opportunity for hearing, appropriate to the nature of the case. Cleveland Board of Education at 503. To comport with the requirements of Due Process, such notice must inform the recipient of a government action, that such action may affect the individual's interests and of the process afforded them to present their objections. Memphis Light, Gas & Water Division v. Craft, 436 U. S. 1 (1978). Here, the Agency failed to comply with any of these requirements.

First, the Agency failed to provide Petitioner Beucke with timely notice of each of the administrative actions against Bayside. Respondent did not notify Petitioner Beucke of reparation proceedings against Bayside until August 27, 2003, approximately a month after default orders had been entered against Bayside. The Agency also failed, prior to instituting the formal disciplinary proceeding against Bayside, on April 26, 2004, to provide Petitioner Beucke

with written notice of the facts involved and to provide him an opportunity to correct Bayside's PACA violations, as required by 7 CFR 1.133. Instead, the Agency chose to wait until May 12, 2004 to send a courtesy copy of the disciplinary complaint against Bayside to Petitioner Beucke's counsel.

Second, the Agency failed to inform Petitioner Beucke that the action against Bayside would affect Petitioner Beucke's personal interests and his right to future licensure and employment. The Agency's letter of May 12, 2004 to Petitioner Beucke's counsel did not state that the outcome of the Bayside disciplinary proceeding would substantially affect Petitioner Beucke's rights. As such, the notice to Petitioner Beucke was wholly insufficient.

The Agency never informed Petitioner Beucke that he was a party to the Bayside action or that he had the right or obligation to participate in the action against Bayside, even though he had previously resigned all of his positions and involvement with Bayside. The Agency never informed Mr. Beucke that entry of judgment against Bayside would preclude him from entering a consent decree, which would allow him to avoid any potential penalties related

to the "responsibly connected" proceeding. The Agency never joined his "responsibly connected" proceeding with the disciplinary proceeding against Bayside as required by 7 CFR 1.137. The Agency never informed Petitioner Beucke that Bayside failed to respond to the complaint and the Agency failed to serve the proposed default order against Bayside upon Petitioner Beucke prior to entry of judgment as required by 7 CFR 1.139.

In sum, Petitioner Beucke was unaware that he would lose substantial rights as a result of the Bayside proceeding. In large part, Petitioner was unaware of this impact because the Agency's policy regarding the disparate treatment of "no pay" and "slow pay" cases is an internal agency policy which an individual can not be reasonably expected to know without proper notice. In such cases, where an agency's internal policies can substantially effect an individual's rights, such policies must be included in the notice to the individual in order for the notice to satisfy the requirements of due process. Memphis Light, Gas & Water Division v. Craft, 436 U. S. 1 (1978).

Third, the Agency failed to inform Petitioner Beucke of the process afforded him to

present his objections with regard to the April 26, 2004 disciplinary action against Bayside. The Agency failed to advise Petitioner Beucke of his right to participate in the action against Bayside and it failed to advise Petitioner Beucke of the procedure through which he could present his objections. Specifically, Petitioner Beucke was not named as a party to the proceeding, nor did the Agency give Petitioner Beucke any of the notification rights that would be afforded to a party. Petitioner Beucke was not informed of the need for him to respond to the allegations against Bayside, nor the time period for filing such a response. Petitioner Beucke was not informed of his right to intervene in the action against Bayside, nor was he provided information regarding how to do so. Petitioner Beucke was not informed of his right to a hearing as to Bayside's liability; nor was he informed how to obtain such a hearing. Petitioner Beucke was not informed that a default decision would be entered against Bayside, if he did not respond to the complaint, nor was he informed that Respondent had requested a default order as required by 7 CFR 1.139.

In each of these ways, Respondent failed to give Petitioner Beucke proper notice and an

opportunity to be heard, in conjunction with the underlying administrative actions against Bayside. These actions substantially effected Petitioner's constitutionally protected rights to licensure and employment with PACA licensees. As such, Respondent violated Petitioner Beucke's rights under the Due Process Clause.

2. **The Agency's And The Ninth Circuit Court's Reliance On The *Kleiman* Case Is Misplaced Because *Kleiman* Involved Requirements Under The Administrative Procedure Act.**

In addition, the Agency's and the Ninth reliance on a footnote in Kleiman, supra. at 691, n. 7 is unavailing since Kleiman only references the requirements of the Administrative Procedure Act("APA"), 5 U.S.C. § 551 et. seq. and not the specific Agency regulations. Petitioner should be afforded his rights under the PACA regulations.

Although the APA provides general guidelines for all government agencies, Section 499f(c)(2) of the PACA, and Sections 1.133(b)(3) and 47.3(b)(2) of the Secretary's Rules of Practice, provide the applicable notice provisions with

respect to this case, as discussed above. It is well-established that the APA is only a general law containing general provisions applicable, inter alia, to the promulgation of regulations by administrative agencies, and that an agency's specific regulation is to be treated as an exception to, or as exempt from, the general provision. See Alta Bates Hospital v. Lackner, 118 Cal. App. 614, 622-623 (1981).

CONCLUSION

The Petition for a writ of certiorari should be granted.

DATED this 17th day of December, 2008

By:

Effie Anastassiou
ANASTASSIOU & ASSOCIATES
242 Capitol Street
Salinas, California 93901

Attorneys for Petitioner
Donald Beucke

STATUTES INVOLVED

1. **7 U.S.C. § 499a(b)(9):**

The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act [7 U.S.C. § 499a et seq.] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

2. **7 U.S.C. § 499c(f)(2):**

(c) Investigation of complaints and notifications.
(1) Commencing or expanding an investigation. If there appears to be, in the opinion of the Secretary, reasonable

grounds for investigating a complaint made under subsection (a) or a written notification made under subsection (b), the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this Act [7 USCS §§ 499a et seq.] are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(2) Issuance of complaint by secretary; process. In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this Act [7 USCS §§ 499a et seq.], the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business. However,

in complaints wherein the amount claimed as damages does not exceed $ 30,000, a hearing need not be held and proof in support of the complaint and in support of respondent's answer may be supplied in the form of depositions or verified statements of fact.

3. **Jencks Act [18 U.S.C. 3500].**

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the

subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in-camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statements to the defendant for his use. If pursuant to such procedure, any portion of such statement is withheld from the defendant and

the defendant objects to such withholding, and trial is continued to an adjudication of guilt of the defendant, the entire test of such statements shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge...

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means

—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him ...

4. **Fifth Amendment To United States Constitution.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

5. **Fourteenth Amendment, Section 1, To United States Constitution.**

All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

6. **7 C.F.R. § 1.141(h)(1)(iii).**

"After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the limitations prescribed in the Jencks Act (18 U.S.C. 3500)."

7. **7 C.F.R. § 1.133(b)(3)**

(b) Filing of complaint or petition for review. (1) If there is reason to believe that a person has violated or is violating any provision of a

statute listed in § 1.131 or of any regulation, standard, instruction or order issued pursuant thereto, whether based upon information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules. (3) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of

the statute, or the regulation, standard, instruction or order promulgated thereunder.

8. **7 C.F.R. § 1.137(b)**

(b) Joinder. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be

consolidated for hearing.

9. 7 C.F.R. § 1.139.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. Copies of the decision or denial of complainant's Motion shall be served by the Hearing Clerk upon each of the parties and may be appealed pursuant to § 1.145. Where the decision as proposed by complainant is entered, such decision shall

become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145: Provided, however, That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

10. 7 C.F.R. § 47.3(b)(2).

(b) Investigations and disposition of informal complaints. (1) Upon receipt of all the information and supporting evidence submitted by the person filing the informal complaint, the Deputy Administrator shall cause such investigation to be made as, in the Deputy Administrator's opinion, is justified by the facts. If such investigation discloses that no violation of the Act has occurred, no further action shall be taken and the person filing the informal complaint shall be so informed.

(2) If the statements in the informal complaint and the investigation thereunder seem to warrant such action, and, in any

case except one of wilfullness or one in which public health, interest or safety otherwise requires, which may result in the suspension or revocation of a license, the Deputy Administrator, in an effort to effect an amicable or informal adjustment of the matter, shall give written notice to the person complained against of the facts or conduct concerning which complaint is made, and shall afford such person an opportunity, within a reasonable time fixed by the Deputy Administrator, to demonstrate or achieve compliance with the applicable requirements of the Act and regulations promulgated thereunder.

August 24, 2004 "Bayside Decision"

UNITED STATES DEPARTMENT OF AGRICULTURE BEFORE THE SECRETARY OF AGRICULTURE

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In re: Bayside Produce, Inc. Respondent	PACA Docket No. D-04-0010 Decision Without Hearing by Reason of Default

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.)* (the "Act"), instituted by a Complaint filed on April 26, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period November 23, 2002, through February

7, 2003, Respondent Bayside Produce, Inc. (hereinafter "Respondent") failed to make full payment promptly to 22 sellers of the agreed purchase prices, or balances thereof; in the total amount of $163,102.70 for 74 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its business mailing address on April 26, 2004, and was returned by the Postal Service to the Department of Agriculture. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on May 12, 2004 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq.*, hereinafter "Rules of Practice").

A copy of the Complaint was also mailed to Respondent by certified mail at its last known principal place of business (street address) on April 26, 2004, and was returned by the Postal Service to the Department of Agriculture. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on May 21,

2004 pursuant to Section 1.147(c) of the Rules of Practice.

Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation incorporated in the state of California on August 6, 1997. Its business address was 1120 Growers St., Salinas, CA 93901. Its mailing address is P.O. Box 7265, Spreckels, California, 93962.

2. At all times material herein, Respondent was licensed under the PACA. License number 19981824 was issued to Respondent on August 26, 1998. This license terminated on August 26, 2003, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph III of the Complaint, during the period November 23, 2002, through February 7, 2003, Respondent purchased, received, and accepted in interstate commerce, from 22 sellers, 74 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $163,102.70.

Conclusions

Respondent's failure to make full payment promptly with respect to the 109 transactions set forth in Finding of Fact No. 4 above constitutes wilful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. §499b(4)), for which the Order below is issued.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this

Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

Done at Washington, D.C.
this 24th day of August,
2004

s/ _____
Administrative Law Judge

May 12, 2004 Initial Determination of
"Responsibly Connected"

May 12, 2004

In reply refer to
File PACA (S-A-03-0078)

Ms. Jane E. Bednar, Esq.
Anastassiou & Associates
Post Office Box 2210
Salinas, California 93902

Dear Ms. Bednar:

On April 26, 2004, a complaint was filed under the Perishable Agricultural Commodities Act (PACA), against Bayside Produce Inc., Salinas, California, alleging that the company committed violations of Section 2(4) of the PACA from November 2002 through February 2003 by failing to pay $163,102.70 to 22 sellers for perishable agricultural commodities purchased, received and accepted in interstate commerce. A copy of the complaint, which has been served on the company, is enclosed for your reference.

We have made an initial determination that your client Donald Beucke was responsibly connected to Bayside Produce Inc., at the time the company is alleged to have committed violations of the PACA, from November 2002 through

February 2003. Section 1(9) of the PACA States:

> **The term "responsibly connected" means affiliated or connected with a commission merchant, dealer or broker (A) partner in a partnership, or (B) officer or holder of more than ten per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act and that the person either was only nominally a partner, officer, director or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.**

The Department's records show that Mr.

Beucke was a 33.3 percent stockholder of the firm, from August 1998 through February 2003. Therefore, it is our initial determination that he was responsibly connected to Bayside Produce Inc. during the period of the alleged violations. Under Sections 4(b) and 8(b) of the PACA, licensing and employment restrictions are placed upon individuals who were responsibly connected to a firm at the time the firm violated the PACA.

You may contest this initial determination by responding in writing to this letter and explaining in detail why the initial determination is incorrect. If you choose to file a written response to this initial determination, it will be reviewed by the Chief of the PACA Branch, who will decide whether your response warrants a change in the initial determination, and will notify you of his determination. You may appeal the Chief's determination and request a formal hearing before an administrative law judge of the United States Department of Agriculture.

If you do not respond to this letter within 30 days from receipt, this initial determination will became the Department's final determination that Mr. Beucke was responsibly connected with Bayside Produce Inc., at the time of the alleged

violations, and you will waive any further procedure or hearing regarding your client Mr. Beucker responsibly connected status. You will be notified of the exact date when your PACA license end employment restrictions will begin.

The Rules of Practice involving responsibly connected proceedings, the PACA and the regulations are available on our website at www.ams.usda.gov/fvlpaca.htm. If you do not have access to the Internet,, contact us at (202) 720-6873 and we will make sure you receive paper copies of this information.

Sincerely,

Karla Whalen, Head
Trade Practice Section
PACA Branch
Fruit and Vegetable Programs

Enclosure

August 17, 2004 Final Determination of
"Responsibly Connected"

USDA

United States Department of Agriculture
Marketing and Regulatory Programs
Agricultural Marketing Service
1400 Independence Ave., SW
Washington, DC 20250-0242

August 17 2004

Ms. Effie F. Anastassiou
Anastassiou & Associates
242 Capitol Street
Salinas CA 93902

Re: PACA Files T-E-2004-3 (Reparation Order) and T-E 2004-34 (Administrative Action) - Responsibly Connected Status of Donald Beucke

Dear Ms Anastassiou:

Reference is made to the responsibility connected status under the Perishable Agricultural Commodities Act (PACA) of your client, Donald Beucke with Bayside Produce Inc. (Bayside).

As you are aware, on August 26, 2003, an

order from a reparation formal complaint under the PACA became final and effective against Bayside. The order requires Bayside to pay $3,566.00 plus $300 and 10% interest from February 1, 2003. Two additional orders became final on September 2, 2003.

Additionally, an administrative complaint was filed against Bayside Produce, alleging that it committed willful, repeated, and flagrant violations of the PACA by failing to pay $163,102.70 to 22 sellers for 74 lots of fruit and vegetables it purchased, received, and accepted in interstate commerce. The time period that the firm is alleged to have violated the Act is December 2002 through February 2003.

Section 1(9) of the PACA, in part, defines responsibly connected as "...affiliated or connected with a commission merchant, dealer, or broker, as (A) partner in a partnership, or (B) officer, or holder of more than 10 per centum of the outstanding stock of a corporation or association." Furthermore, Section 1(9) states that a person will not be held responsibly connected if the person establishes, by a preponderance of the evidence that he was not actively involved in the activities that lead to the violations of the Act.

and also establishes that he was only nominally an officer, director, or stockholder of the violator firm.

For both the reparation order and administrative complaint there is evidence on the record that shows that Mr. Beucke was a 33.3 percent shareholder, vice president, secretary and director of Bayside during the time of the alleged violations. Therefore, under the circumstances, I must determine that Donald Beucke was responsibly connected with Bayside during the period of the alleged violations. These are final determinations of your client's responsibly connected status by the PACA Branch. Any challenge of these determinations must follow the procedures outlined below and describe in detail the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary found at 7 C.F.R. Subpart H.

If you disagree with my determination, a petition for review may be filed with the U.S. Department of Agriculture, OALJ, Hearing Clerk, Room 1081, South Building, 1400 Independence Avenue, S.W., Washington, D.C. 20250-9200. The petition must be filed within 30 days from the

date of this letter is received, in accordance with Section 47.49 of the Rules of Practice Under the Perishable Agricultural Commodities Act, 1930.

Sincerely,

s/_____

James R. Frazier
Chief
PACA Branch
Fruit and Vegetable Programs
http://www.ams.usda.gov/fv/PACA.htm

November 17, 2005 Order Denying Motion for Reconsideration

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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

PACA APP DOCKET NO. 04-0014

PACA APP DOCKET NO. 04-0020

In re: DONALD R. BUECKE

and

KEITH K. KEYESKI

Petitioners

ORDER

This matter is before the Administrative Law Judge upon the Petitioner Donald Beucke's Motion for Reconsideration of [my] Rulings Denying Petitioner's Request for An Order Requiring PACA To Produce Its Investigation Report(s) and Denying Petitioner's Request That

PACA Be Ordered to Produce the Investigation Report(s) for In-Camera Inspection & Supporting Memorandum. The Respondent has filed their Reply to the Motion.

Petitioner Buecke's request recites that it is based upon PACA Rules of Practice for Disciplinary Hearings (Sec. 141(h)(1)(iii)), the Jencks Act (18 U.S.C. § 3500), *Brady v. Maryland,* 373 U.S. 83 (1963) and the Due Process Clauses of the U.S. Constitution, Amendments V and XIV and seeks a reversal of my ruling at the oral hearing to require the production of the Investigation Report and seeks reopening of the evidentiary portion of the administrative hearing to allow additional cross examination of the Respondent's witnesses.

As noted in the Respondent's Reply, reliance upon *Brady v. Maryland* is misplaced as *Brady* does not apply to these administrative proceedings. The pertinent Rule of Practice, 7 C.F.R. § 1.141(h)(1)(iii) provides:

> After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of **any statement, or part**

> **thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified.** Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. §3500). (Emphasis added)

At the hearing, counsel for the Respondent cited *In re: Miguel A. Machado and G. L. "Bud" Cozzi,* 42 Agric. Dec. 820 (1983) as authority for the proposition that it is the Department's established position to protect the confidentiality of investigation reports to the maximum extent permitted by law, and to prevent respondents from having access to investigation reports or portions thereof insofar as legally possible. In that case, the Judicial Officer (hereinafter "JO") noted that under certain circumstances it might be appropriate for the judge to review the report in camera to determine whether it contained witness' statement relating to the witness' direct testimony setting out a six part test for a "clear showing" of Jencks Act materials thereby overriding the Agency's deliberative privilege. As

I find that Petitioner's request falls short of such a clear showing, I reaffirm my earlier ruling that the Investigation Report falls outside Rule 1.141(h)(1)(iii) and does not have to be produced.

Accordingly, the Petitioner's Buecke's Motion for Reconsideration of my Rulings Denying Petitioner's Request for an Order Requiring PACA to Produce its Investigation Report(s) and Denying Petitioner's Request that PACA be Ordered to Produce the Investigation Report(s) for In Camera Inspection is **DENIED.**

Copies of this Order shall be served upon the Parties by the Hearing Clerk's Office.

Done at Washington, D.C.
November 17, 2005
s/
PETER M. DAVENPORT
Administrative Law Judge

Copies to: Effie Anastassiou, Esquire
Paul Moncrief, Esquire
Charles L. Kendall, Esquire

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue SW
Room 1031, South Building
Washington, D.C. 20250-9203
202-720-4443
Fax: 202-720-9776

December 20, 2005 Decision And Order By
Judge Davenport

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2005 DEC 20 PM 5:25
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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

PACA APP DOCKET NO. 04-0014

PACA APP DOCKET NO. 04-0020

In re: DONALD R. BUECKE

and

KEITH K. KEYESKI

Petitioners

DECISION AND ORDER

This proceeding was initiated by two petitions for review of determinations by the Agricultural Marketing Service that subjected Donald R. Beucke and Keith K. Keyeski to

employment restrictions for being "responsibly connected" with Bayside Produce, Inc., (Hereinafter "Bayside"), a corporation found to have willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act (7 U.S.C. § 499, *et seq.*, the "PACA").

Bayside, a PACA licensee, was the subject of a disciplinary complaint that resulted in a default decision being entered against it on August 25, 2004 by

Administrative Law Judge Victor W. Palmer. The default decision authorized publication of the finding that Bayside willfully, flagrantly and repeatedly violated the PACA by failing to pay $163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period from November 23, 2002 to February 7, 2003.

An oral hearing in this matter was held in San Jose, California on October 12 and 13, 2005. Donald R. Beucke is represented by Effie F. Anastassiou, Esquire and Paul Hart, Esquire, both of Anastassiou & Associates, Pismo Beach and Salinas, California; Keith K. Keyeski is represented by Paul W. Moncrief, Esquire, Lombardo & Giles, P.C., Salinas, California; and

the Respondent is represented by Charles L. Kendall, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C.

A total of 45 exhibits were admitted into evidence on behalf of Petitioner Beucke (CX 1-45) and 9 exhibits on behalf of Petitioner Keyeski (KK 1-9). Thirty-three exhibits were introduced and admitted by the Respondent, consisting of the certified Agency Record for Petitioner Beucke (RX 1-21), the additional exhibits introduced at the hearing (RX 22-25) and the certified Agency Record for Petitioner Keyeski (EX 1-8). Briefs have been filed by all parties.

Upon consideration of all of the evidence, I conclude that Donald R. Beucke and Keith K. Keyeski were responsibly connected with Bayside at the time it was a licensee violating the PACA and for that reason, they are subject to the employment restrictions on their employment by PACA licensees pursuant to 7 U.S.C. § 499h(b).

During the time of the violations,[1] Donald R. Beucke was the Vice President, Secretary and a director of Bayside. Keith K. Keyeski had been a Vice President and a director of Bayside, but resigned those positions prior to the November 23, 2002 date. He did however continue to manage the San Diego office of Bayside until December 13, 2002. The two petitioners each held 33 1/3 % of the corporation's outstanding shares. For those reasons, each comes within the presumptive definition of a person deemed to be "responsibly connected" with a corporate licensee found to be in violation of the PACA.

The term "responsibly connected" is defined in § 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)):

> The term "responsibly connected" means affiliated or connected with a commission merchant, dealer or broker (A) partner in

---

[1] Keith K. Keyeski orally resigned as an officer and director on October 8, 2002 and confirmed his verbal resignation by letter dated October 18, 2002. (KK 5). He did not however relinquish his shares until March 11. 2003. (KK 1). Donald R. Beucke's participation in the affairs of Bayside is documented during the entire period.

> a partnership, or (B) officer or holder of more than ten per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act and that the person either was only nominally a partner, officer, director or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The second sentence was added by amendment in 1995 and affords those who would otherwise fall within the statutory definition of "responsibly connected" an opportunity to demonstrate that they were not responsible for the specific violation. The amendment was discussed in *Michael Norinsberg v. United States Department of Agriculture and United States of America,* 162 F. 3d 1194, 1196-1197 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-1467 (1998); *In re Lawrence D. Salins,* 57 Agric. Dec. 1474, 1482-1487 (1998); and *In re Michael* J. *Mendenhall,* 57

Agric. Dec. 1607, 1615-1619 (1998).

The amendment creates a two prong test for rebutting the statutory presumption:

> ...the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that the petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners. *Salins*, 57 Agric. Dec. 1474, 1487-1488.

Actual knowledge of PACA violations is not required as active involvement may be found where a petitioner has made produce purchases

for which the suppliers were not paid, and where a petitioner chose to make purchases of produce even though he or she knew or should have known that the company was not paying produce suppliers for perishable agricultural commodities. *In re Janet* S. *Orloff, Merna K Jacobsan and Terry A. Jacobson,* 62 Agric. Dec. 281 (2003).

Both petitioners argue that they were only nominally involved, asserting that the financial aspects of the business were handled exclusively by Wayne Martindale, the President of Bayside and owner of the other 33 1/3% of the shares of the corporation not owned by the petitioners. The testimony of numerous witnesses called by the Respondents supports their position only to the extent that it establishes Martindale did retain possession of the corporation's checkbook and was the individual that those that did business with Bayside regarded as the individual responsible for payment of invoices.

The petitioners both have significant experience and lengthy involvement with the produce industry. Donald Beueke has twenty-six years of experience in the industry, starting initially as a field inspector and later progressing

to the position of buyer and broker. (Tr. 213-214). He has served as the President of Martindale Distributing Company, a business founded by his late stepfather, Dale Martindale, (Tr. 218, 312) and was the Vice-President, Secretary and a director of Bayside (RX 1) as well owning shares in two other businesses involved in the produce industry.[2] He acknowledged being able to and did sign Bayside checks,[3] but testified that he did so only when directed to do so by Wayne Martindale or Shane Martindale, both of whom are his step brothers, or Kathy Walker, the Executive Coordinator of Bayside. (Tr. 235-240). By his testimony, his involvement with Bayside was limited to purchases and sales for one account, Produce People, and that he last took an order from them

[2] Donald Beucke testified that his late step father Dale Martindale gave him a 1/3 interest in Martindale Produce, that he initially owned half of Bayside before he and Wayne Martindale each sold enough shares to Keith K. Keyeski to enable him to acquire a 1/3 interest. He owned a 1/3 interest in Garden Fresh.

[3] (Tr. 234-235). CX 39 contains 29 checks written by Respondent Beucke on Bayside's Community Bank of Central California account, including two written to himself.

in February of 2003. *(Yr.* 243-246). He resigned as Vice President, as director, and from any position of employment of and with Bayside by letter dated April 11, 2003 and executed a document titled Resignation and Acknowledgment of Stock Redemption dated October 23, 2003 which surrendered his shares in Bayside as of April 4, 2003. (CX 6-7).

Keith K. Keyeski started his career in the produce business in 1985 or 1986 working in the warehouse and worked his way up to a position in sales. He had become acquainted with Wayne Martindale and Donald Beucke through his industry contacts and sometime around August of 1997 started working for them out of his home and later opening an office for Bayside in San Diego, California. According to his account, he joined Bayside in an arrangement that was "basically a three-way partnership" with "equal duties, equal opportunity, equal money, equal everything." (Tr. 359-360, 361-362). Except for writing checks for produce and other major expenses, he ran the day to day operation of the

San Diego office of the corporation.[4] Once he managed to accumulate a necessary $7,000.00 investment, he became a shareholder, director and officer in February of 2000; however, according to his account, nothing really changed after he became a shareholder, director and officer of the corporation. The San Diego operation grew significantly and by 2002 was generating the bulk of Bayside's sales.[5] In October of 2002, by then convinced that Wayne Martindale was not "pulling his weight" and unhappy with the monetary return from his own efforts, he contacted William Trask, an attorney, for advice. (Tr. 374). Trask drafted a letter for Keith Keyeski to Wayne Martindale and Donald Beucke dated October 18, 2002 which confirmed his verbal notice of October 8, 2002, that he was resigning as Vice President and as a member of

[4] Bayside did have an account at Bank of America that Keith Keyeski was able to write checks on; however, according to testimony, only a minimal balance was maintained in the account which was used only for payroll, rent and minor incidental expenses. (Tr. 362-363).

[5] Tr. 376. According to Keyeski, Donald Beucke did generate income for the corporation, but Wayne Martindale was not.

the board of directors and that as of December 31, 2006[6] he would be resigning all positions at Bayside. The letter went on to propose that each of them continue to contribute to the business as usual and suggested three alternatives, one of which was his offer to purchase Bayside. (Tr. 374-375; KK 5). No formal response to the letter was received, but sometime in November of 2002 Wayne Martindale advised he had conferred with Donald Beucke and that "they" wanted to keep the business. (Tr. 375-378). Thereafter Keyeski's contact with Wayne Martindale became difficult, with little or no information being provided by Martindale. (Tr. 377). As he had suggested in his October 18, 2002 letter, Keyeski continued to run Bayside's San Diego office and processed orders as usual as "[t]hat's my job" until December 13, 2002. (Tr. 385). On December 15, 2002, he obtained his own PACA license and commenced operation from Bayside's former San Diego location as New Horizon Distributing, Inc. Still anticipating some return from his investment as he thought Bayside was financially sound, he retained his shares in

[6] This was verbally amended to December 13, 2002.

Bayside until March of 2003.[7] (KK 1-2).

The evidence introduced through multiple witnesses called by the Petitioners demonstrates that the companies that dealt with Bayside lodged the blame for Bayside's payment problems on Wayne Martindale's misconduct and not on either Donald Beucke or Keith Keyeski. Universally those witnesses professed to remain willing to do business with both of them. Both men are regarded as honorable and after the fact have contributed significant amounts financially to attempt to correct the problems which occurred. There is no evidence that either of them personally engaged in any affirmative action designed to leave suppliers unpaid. Neither of them however acted upon the reports coming to them that invoices were not being paid

[7] Keith Keyeski's letter of March 11, 2003 requested that minutes of the corporation be forwarded to him that reflected that he was not affiliated with Bayside "other than as a shareholder" after December 14, 2002. (KK 1)

in a timely manner.[8] Such failure to exercise their oversight obligations owed by them to the corporation as shareholders, if not as officers, cannot be excused. Their failure to employ their majority interest in the corporation to constrain and halt the misconduct of Wayne Martindale did leave suppliers unpaid. Because they had such power and failed to exercise it while still holding positions as shareholders, a corporate officer and or actively involved in Bayside's business activities, neither of them can be considered "only nominally a partner, officer, director, or shareholder of a violating licensee". Accordingly, the following Findings of Fact and Conclusions of Law will be made.

FINDINGS OF FACT

1. Bayside Produce, Inc. is a California corporation, organized and chartered on

[8] Keyeski denied hearing any reports of non payment until the second or third week of January of 2003 which was after he had resigned as an officer and director of Bayside. (Tr. 385) He however remained a shareholder until March 11, 2003 noting in his letter of that date that "... as of December 14, 2002, other than as a shareholder, I was not affiliated in any way with Bayside Produce, Inc." (KK 1)

September 15,1997, which applied for and received PACA License Number #19981824. Annual renewals of that license were made on or before its annual anniversary date through 2002 for the year ending August 26, 2003. (RX 1-2).

2. Bayside's shareholders and directors consisted of Wayne Martindale and Donald Beucke, with each of them owning 50% of the shares of outstanding stock until February 22, 2000 when Bayside amended its by-laws to increase the number of directors from two to three and adding Keith Keyeski as an equal shareholder, officer and member of the board of directors. (RX 4; EX 6).

3. Pursuant to a Default Decision entered by Administrative Law Judge Victor W. Palmer, Bayside was found to have wilfully, flagrantly and repeatedly violated the PACA by failing to timely pay $163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period November 23, 2002 to February 7, 2003. (CX 1; RX 22).

4. Petitioner Beucke has significant experience with over 26 years in the produce industry and has owned and held positions as a corporate officer in two other produce companies

beside Bayside. He was listed on Bayside's PACA license and license certificate as Vice President, Secretary, director and as a 33 1/3% shareholder throughout the violation period from November 23, 2002 to February 7, 2003. His signature appears on the initial minutes of the Bayside Board of Director's meeting on September 15, 1997, the stock certificate issued in his name and the minutes of the Bayside Board of Director's February 22, 2000 meeting. (Tr. 213-214, 218, and 312; RX 1-4; CX 9, 10, 11 and 12).

5. Petitioner Beucke purchased produce on behalf of Bayside on at least 33 occasions during the violation period of November 23, 2002 to February 7, 2003 for which the suppliers of the produce were not paid. (Tr. 248-252, 300-305, 323-324; CX 21, 23, 26, 32, 33, and 35).

6. Petitioner Beucke's name and signature appeared on the bank signature card for for Bayside's Bank America Account # 01719-21437 and he was authorized to draw funds on that account during the period November 23, 2002 to February 7, 2003. (RX 23).

7. Petitioner Beucke's name and

signature appeared on the bank authorizations for Bayside's Community Bank of Central California Account # 1361955 and he was authorized to draw funds on that account during the period November 23, 2002 to February 7, 2003. During that period, he signed 29 checks on the account, including checks to 11 produce suppliers as well as 2 checks payable to himself. (RX 24; CX 39 pp. 222, 272, 296, 360, 505, 571, 595, 597. 607, 710, 726, 730, and 736).

8. Petitioner Beucke, as an officer of Bayside, signed a Corporate Resolution to Borrow under Loan # 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003. (RX 24).

9. By letter dated April 30, 2003 from his attorney Lester W. Shirley to Wayne Martindale, Petitioner Beucke tendered his resignation as a director and Vice President of Bayside as well as from any position of employment with Bayside. (RX 1; CX 6).

10. On October 23, 2003, Petitioner Beucke executed documents entitled Resignation and Acknowledgment of Stock Redemption and Stock Assignment Separate from Stock

Certificate, both of which purported to be effective April 4, 2003. (RX 5-6; CX.7).

11. Petitioner Keyeski has been involved in the produce business since 1985 or 1986, starting first in the warehouse before moving into sales. From sometime in 1990 until July of 1997, he was the sales manager of Coast Citrus Distributors, a San Diego company. (Tr. 357, 393).

12. Starting in approximately August of 1997, he entered into an arrangement with Wayne Martindale and Petitioner Beucke that was "basically a three way partnership, ... equal duties, equal opportunity, equal money, equal everything." (Tr. 358-359)

13. Once he managed to accumulate the necessary $7,000.00 investment, on February 22, 2000, Petitioner Keyeski attended a Bayside board meeting in Salinas, California and became a 33 1/3% shareholder, Vice President and director of Bayside. (Tr.368).

14. Petitioner Keyeski ran the San Diego office of Bayside as a general manager, controlling all aspects of its operation, including managing the payroll, paying the rent and other incidental expenses of Bayside's San Diego

business except for depositing receivables and paying for purchases of produce. (Tr. 364-365, 397).

15. Petitioner Keyeski purchased produce on behalf of Bayside on at least four occasions during the violation period November 23, 2002 to February 7, 2003 for which suppliers of the produce were not paid. (Tr. 161-164, 167-168; CX 16; CX 28; CX 41 and CX 44).

16. By letter dated October 18, 2002, Petitioner Keyeski confirmed his verbal notice of October 8, 2002 that he was resigning as Vice President and as a member of the board of directors of Bayside and that he would be resigning all positions at Bayside as of December 31, 2002. The December 31, 2002 date was later verbally changed to December 13, 2002. (Tr. 375; KK 5; EX 5).

17. On March 3, 2003, Petitioner Keyeski executed a Declaration of Lost Stock [Certificate] and Assignment of Shares which was forwarded to Bayside by letter dated March 11, 2003. (Tr. 386; KK 1; KK 2; EX 8).

CONCLUSIONS OF LAW

1. Petitioner Beucke was actively

involved with Bayside at the time it was committing violations of the PACA. He was the Vice President, Secretary and a member of the board of directors, as well as holding 33 1/3% of the outstanding stock of Bayside during the period November 23, 2002 to February 7, 2003 and purchased produce from suppliers that were not paid during that period.

2. By reason of his active involvement with Bayside, Petitioner Beucke was not only nominally a partner, officer, director, or shareholder of Bayside during the period November 23, 2002 to February 7, 2003 and was an owner of a violating entity which was the alter ego of its owners.

3. Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA. Although he had resigned his positions as Vice President and member of the board of directors prior to the period November 23, 2002 to February 7, 2003, he retained his 33 1/3% stock ownership until March 11, 2003, he continued to run Bayside's San Diego operation of Bayside through December 13, 2002 and purchased produce from suppliers that were not

paid during the period November 23, 2002 through at least December 10, 2002.

4. By reason of his active involvement with Bayside, Petitioner Keyeski was not only nominally a partner, officer, director, or shareholder of Bayside during the period November 23, 2002 to February 7, 2003 and was an owner of a violating entity which was the alter ego of its owners.

ORDER

1. The determination of the Chief of the PACA Branch that Donald R. Beucke was responsibly connected with Bayside during the period November 23, 2002 to February 7, 2003 during which period Bayside wilfully, flagrantly and repeatedly violated the PACA by failing to pay $163,102.70 for 74 lots of produce purchased in interstate commence from 22 sellers should be affirmed.

2. The determination of the Chief of the PACA Branch that Keith K. Keyeski was responsibly connected with Bayside during the period November 23, 2002 to February 7, 2003 during which period Bayside wilfully, flagrantly and repeatedly violated the PACA by failing to

pay $163,102.70 for 74 lots of produce purchased in interstate commence from 22 sellers should be affirmed.

This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed within thirty (30) days after service.

Copies of this Decision and Order shall be served upon the Parties by the Hearing Clerk's Office.

Done at Washington, D.C.
December 20, 2005

s/

PETER M. DAVENPORT
Administrative Law Judge

Copies to: Effie Anastassiou, Esquire
Paul Moncrief, Esquire
Charles L. Kendall, Esquire

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue SW
Room 1031, South Building
Washington, D.C. 20250-9203
202-720-4443 / Fax: 202-720-9776

November 8, 2006 Final Order by Judicial Officer William G. Jenson

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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: Donald R. Beucke, Petitioner	PACA-APP Docket No. 04-0014
and	
In re: Keith K. Keyeski, Petitioner	PACA-APP Docket No. 04-0020 **Decision and Order**

PROCEDURAL HISTORY

On August 13, 2004, James R. Frazier, Chief,

PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Keith K. Keyeski [hereinafter Petitioner Keyeski] was responsibly connected with Bayside Produce, Inc., during the period December 2002 through February 2003, when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[1] On August 17, 2004, Respondent issued a determination that Donald R. Beucke [hereinafter Petitioner Beucke] was responsibly connected with Bayside Produce, Inc., during the period December 2002 through February 2003, when Bayside Produce, Inc., violated the PACA[2] and when Bayside

[1] During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., purchased, received, and accepted in interstate commerce, from 22 produce sellers, 74 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $163,102.70, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

[2] See note 1.

Produce, Inc., failed to pay three reparation awards issued

against it.[3]

On August 25, 2004, Petitioner Beucke instituted PACA-APP Docket No. 04-0014 by filing "Petition of Donald R. Beucke for Review of Determination Re Responsibly Connected Status" pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc. On September 13, 2004, Petitioner Keyeski instituted PACA-APP Docket No. 04-0020 by filing "Petition for Review" pursuant to the PACA and the Rules of Practice seeking reversal of Respondent's August 13, 2004, determination that Petitioner Keyeski was responsibly connected with Bayside Produce, Inc.

[3] One reparation order issued against Bayside Produce, Inc., became effective August 26, 2003, the other two reparation orders issued against Bayside Produce, Inc., became final September 2, 2003.

On October 12 and 13, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] presided over a hearing in San Jose, California. Effie F. Anastassiou and Paul Hart, Anasiassiou & Associates, Pismo Beach and Salinas, California, represented Petitioner Beucke. Paul W. Moncrief, Lombardo & Gilles, P.C., Salinas, California, represented Petitioner Keyeski. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On December 20, 2005, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA (Initial Decision at 2, 12).

On January 23, 2006, Petitioner Beucke and Petitioner Keyeski appealed to the Judicial Officer. On February 15, 2006, Respondent filed a response to Petitioner Beucke's appeal petition and Petitioner Keyeski's appeal petition. On April 7, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration

and decision.

Based upon a careful consideration of the record, I agree with the ALJ's conclusion that Petitioner Beueke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA. References to the transcript are designated "Tr." References to Petitioner Beucke's exhibits are designated "CX." References to Petitioner Keyeski's exhibits are designated "KK." References to Respondent's exhibits are designated "RX" and "EX."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7 – AGRICULTURE

. . . .

CHAPTER 20A – PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act [7 U.S.C. § 499a et seq.] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent

purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination;

renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the, annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.] . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who-

(A) has had his license revoked

under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the

Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such

bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of tile offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person-

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may,

after thirty days[']notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b).

DECISION

Preliminary Statement

Responsibly connected liability is triggered when a company has its PACA license revoked or suspended or when the company has been found to have committed flagrant or repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to 22

produce sellers for 74 lots of perishable agricultural commodities, in the total amount of $163,102.70.[4] Thus, an individual who was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[5] Petitioner Beucke was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U,S.C. § 499b(4). The burden is on Petitioner Beucke to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce,

[4] *In re Bayside Produce. Inc.*, 63 Agric. Dec. 1029 (2004).

[5] 7 U.S.C. § 499a(b)(9).

Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Keyeski was a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner Keyeski to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite being a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the

violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner Beucke failed to carry his burden of proof that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. Petitioner Beucke also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Keyeski failed to carry-his burden of proof that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. Petitioner Keyeski also failed to carry his burden of proof that he was only nominally a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Moreover, as Petitioner Beucke and Petitioner Keyeski were owners of Bayside Produce, Inc., the defense that they were not owners of Bayside Produce, Inc., which was the alter ego of its owners, is not available to Petitioner Beucke or

Petitioner Keyeski.[6] As Petitioner Beucke and Petitioner Keyeski have failed to carry their burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Beucke and Petitioner Keyeski are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Facts

[6] *In re Donald R. Beucke*, _ Agric. Dec. _, slip op. at 13-14 (Sept. 28, 2006); *In re Edward S. Martindale*, _ Agric. Dec. _ slip op. at 9 (July 26, 2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), _ Agric. Dec. _, slip op. at 11 (Jan. 24, 2006), *aff'd per curiam*, 2006 WL 2351839 (11th Cir. Aug. 15, 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 *(1997), aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1 464 (1998).

During the period when Bayside Produce, Inc., was violating the PACA, Petitioner Beucke was the vice president, the secretary, and a director of Bayside Produce, Inc. (RX 1). Petitioner Keyeski had been a vice president and a director of Bayside Produce, Inc., but resigned those positions prior to November 23, 2002 (EX 1 at 3; KK 5). Petitioner Keyeski did however continue to manage the San Diego, California, office of Bayside Produce, Inc., until December 13, 2002. Petitioner Beucke and Petitioner Keyeski each held 33 1/3 percent of the outstanding shares of Bayside Produce, Inc. (RX 1; EX 1 at 3; KK 1).

Petitioner Beucke and Petitioner Keyeski argue they were not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA, asserting the financial aspects of the business were handled exclusively by Wayne Martindale, the president of Bayside Produce, Inc., and owner of the 33 1/3 percent of the shares of the corporation not owned by Petitioner Beucke and Petitioner Keyeski. The testimony of numerous witnesses called by Petitioner Beucke and Petitioner Keyeski supports their position only to the extent that it establishes Wayne Martindale was the

individual that those that did business with Bayside Produce, Inc., regarded as responsible for payment of invoices.

Petitioner Beucke and Petitioner Keyeski have significant experience and lengthy involvement with the produce industry. Petitioner Beucke has approximately 26 years of experience in the produce industry, starting initially as a field inspector and later progressing to the positions of buyer and broker (Tr. 213-14). Petitioner Beucke has served as the president of Martindale Distributing Company, a produce business founded by his late stepfather, Dale Martindale (Tr. 218, 312), and as vice president of another produce company, Garden Fresh Produce, Inc. In addition to his ownership interest in Bayside Produce, Inc.[7] Petitioner Beucke owned 33 1/3 percent of the outstanding stock of Martindale Distributing Company and 20 percent of the outstanding stock of Garden Fresh Produce, Inc. (Tr. 312-14; RX 1).

[7] Petitioner Beucke testified that he initially owned 50 percent of the outstanding stock Bayside Produce, Inc., before he and Wayne Martindale each sold enough shares to Petitioner Keyeski to enable Petitioner Keyeski to acquire a one-third interest in Bayside Produce, Inc. (Tr. 312-14).

Petitioner Beucke acknowledged that he was authorized to sign and did sign Bayside Produce, Inc., checks (Tr. 234-35),[8] but testified he only signed checks when directed to do so by Wayne Martindale or Edward Shane Martindale, both of whom are his stepbrothers, or Kathy Walker, the executive coordinator of Bayside Produce, Inc. (Tr. 235-40). Petitioner Beucke testified his involvement with Bayside Produce, Inc., was limited to purchases and sales for one account, Produce People, and that he last took an order from Produce People in February 2003 (Tr. 243-47). Petitioner Beucke resigned as vice president and director of, and from any position of employment with, Bayside Produce, Inc., by letter dated April 11, 2003, and executed a document entitled "Resignation and Acknowledgment of Stock Redemption" dated October 23, 2003, which surrendered his shares in Bayside Produce, Inc., effective April 4, 2003 (CX 6, CX 7).

Petitioner Keyeski started his career in

[8] CX 39 contains 20 checks written by Petitioner Beucke during the period November 23, 2002, through February 7, 2003, on Bayside Produce, Inc.'s Community Bank of Central California account, including two payable to himself (Tr. 239-40).

the produce business in 1985 or 1986 working in the warehouse and later working in sales. Petitioner Keyeski had become acquainted with Wayne Martindale and Petitioner Beucke through his industry contacts and sometime around August of 1997 started working for them out of his home and later opening an office for Bayside Produce, Inc., in San Diego, California. Petitioner Keyeski testified that he joined Bayside Produce, Inc., in an arrangement that was "[b]asically a three-way partnership" with "equal duties, equal opportunity, equal money, equal everything." (Tr..358-62, 393.) Except for writing checks for produce and other major expenses, Petitioner Keyeski ran Bayside Produce, Inc.'s day-to-day operation in the San

Diego, California, office.[9] Once Petitioner Keyeski managed to accumulate a necessary $7,000 investment, he became a shareholder, a director, and an officer of Bayside Produce, Inc., in February 2000; however, Petitioner Keyeski testified nothing really changed after he became a shareholder, director, and officer of the corporation (Tr. 361-68; RX 4). The San Diego, California, operation grew significantly and by 2002 the San Diego operation generated the bulk of Bayside Produce, Inc.'s sales (Tr. 376).[10] In October 2002, by then convinced that Wayne Martindale was not "pulling his weight" and unhappy with the monetary return from his own efforts, Petitioner Keyeski contacted William Trask, an attorney, for advice (Tr. 374). Mr. Trask drafted a letter for Petitioner Keyeski to Wayne Martindale and Petitioner Beucke dated October 18, 2002, which confirmed his verbal

[9] Bayside Produce, Inc., did have an account at Bank of America on which Petitioner Keyeski was able to write checks; however, only a minimal balance was maintained in the account which was used only for payroll, rent, and incidental expenses (Tr. 362-63).

[10] According to Petitioner Keyeski, Petitioner Beucke generated income for Bayside Produce, Inc., but Wayne Martindale did not (Tr. 371-72).

notice of October 8, 2002, that he was resigning as vice president and as a director of Bayside Produce, Inc., and that, effective December 31, 2002,[11] he would be resigning all positions at Bayside Produce, Inc. Petitioner Keyeski's October 18, 2002, letter also proposed that Petitioner Beucke, Wayne Martindale, and Petitioner Keyeski continue to contribute to the business as usual and suggested three alternatives, one of which was Petitioner Keyeski's offer to purchase Bayside Produce, Inc. (Tr. 374-75; KK 5). Petitioner Keyeski did not receive a written response to his October 18, 2002, letter, but sometime in November 2002 Wayne Martindale advised that he had conferred with Petitioner Beucke and that they wanted to retain Bayside Produce, Inc. (Tr. 375-78). Thereafter, Petitioner Keyeski's contact with Wayne Martindale became difficult, with little or no information being provided by Wayne Martindale (Tr. 377-78). As he had suggested in his October 18, 2002, letter, Petitioner Keyeski continued to run Bayside Produce, Inc.'s San Diego, California, office and processed orders as

[11] Petitioner Keyeski verbally amended the effective date of his resignation from all positions at Bayside Produce, Inc., to December 13, 2002 (KK5).

usual until December 13, 2002 (Tr. 385). On December 15, 2002, Petitioner Keyeski obtained his own PACA license and commenced operation from Bayside Produce, Inc.'s former San Diego, California, location as New Horizon Distributing, Inc. (Tr.380-81). Still anticipating some return from his investment, as he thought Bayside Produce, Inc., was financially sound, Petitioner Keyeski retained his shares in Bayside Produce, Inc., until March 2003 (KK 1, KK 2).[12]

The evidence introduced through multiple witnesses called by Petitioner Beucke and Petitioner Keyeski demonstrates that the produce sellers that dealt with Bayside Produce, Inc., lodged the blame for Bayside Produce, Inc.'s payment problems on Wayne Martindale's misconduct and not on either Petitioner Beucke or Petitioner Keyeski. Those witnesses professed to remain willing to do business with both Petitioner Beucke and Petitioner Keyeski. Both Petitioner Beucke and Petitioner Keyeski are regarded as honorable and have contributed

[12] Petitioner Keyeski's letter of March 11, 2003, requested that minutes of the corporation be forwarded to him that reflected that he was not affiliated with Bayside Produce, Inc., "other than as a shareholder" after December 14, 2002 (KK 1).

significant amounts of money to attempt to correct Bayside Produce, Inc.'s failures to pay for produce in accordance with the PACA. There is no evidence that either Petitioner Beucke or Petitioner Keyeski personally engaged in any affirmative action designed to leave produce suppliers unpaid. Neither Petitioner Beucke nor Petitioner Keyeski however acted upon the reports to them that invoices were not being paid in a timely manner.[13] The failure to exercise their oversight obligations owed by them to Bayside Produce, Inc., as shareholders, if not as officers and directors, does not establish that Petitioner Beucke's and Petitioner Keyeski's roles were nominal.

Discussion

I. Petitioner Beucke and Petitioner Keyeski Were Actively Involved in

[13] Petitioner Keyeski denied hearing any reports of nonpayment until the second or third week of January 2003, which was after he had resigned as vice president and director of Bayside Produce, Inc. (Tr. 385). Petitioner Keyeski however remained a shareholder until March 2003, noting in his letter dated March 11, 2003, that "as of December 14, 2002, other than as a shareholder, I was not affiliated in any way with Bayside Produce, Inc." (KK 1).

Activities Resulting in Bayside Produce, Inc.'s PACA Violations

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the

responsibly connected test.

Petitioner Beucke did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during. the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35). Petitioner Beucke was authorized to draw funds on Bayside Produce, Inc.'s Community Bank of Central California account number 1361955 and, during the period November 23, 2002, through February 7, 2003, Petitioner Beucke signed 20 checks on that account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow money from Community Bank of Central California for a loan dated January 31, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

Petitioner Keyeski did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., on at least four occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44). In addition, during the period November 23, 2002, through December 13, 2002, Petitioner Keyeski was the general manager of Bayside Produce, Inc.'s San Diego, California, office. Petitioner Keyeski controlled all aspects of Bayside Produce, Inc.'s San Diego, California, operation, except for depositing receivables and paying for produce purchases. Petitioner Keyeski's duties included managing payroll and paying rent and other incidental expenses.

Petitioner Beucke's and Petitioner Keyeski's purchases of produce for which Bayside Produce, Inc., failed to pay produce sellers in accordance with the PACA constitutes active involvement in activities resulting in Bayside Produce, Inc.'s violations of the PACA. Moreover, by payment of certain creditors,

Petitioner Beucke and Petitioner Keyeski were in effect choosing which debts to pay. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), I held that choosing which debts to pay "can cause an individual to be actively involved in failure to pay promptly for produce." *Id.* at 1489.

II. Petitioner Beucke Was Not Merely a Nominal Officer, Director, *and Shareholder of Bayside Produce, Inc.; Petitioner Keyeski Was Not Merely a Nominal Shareholder of Bayside Produce, Inc.*

Petitioner Beucke did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 33 1/3 percent shareholder, director, secretary, and vice president of Bayside Produce, Inc. Similarly, Petitioner Keyeski did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 33 1/3 percent shareholder of Bayside Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the

violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.[14] The record establishes Petitioner Beucke and Petition Keyeski each had an actual, significant nexus with Bayside Produce, Inc., during the violation period.

Petitioner Beucke was a co-founder of Bayside Produce, Inc., who invested $7,000 as part of the initial capitalization of Bayside Produce, Inc. (RX 1-RX 3). Petitioner Beucke'-s relationship to Bayside Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate

[14] *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner Beucke is an experienced, savvy individual who has worked in the produce business for approximately 26 years, who has worked for years with some or all of the principals in Bayside Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 33 1/3 percent owner does not

serve in a nominal capacity.[15]

There is no evidence that Petitioner Beucke was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, the secretary

[15] *Siegel* v. *Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc.* v. *United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martina*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino* v. *United Stales Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

and a co-owner in an attempt to establish a profitable business. Petitioner Beucke presumably would have shared in Bayside Produce, Iric.'s profits when there were some. Petitioner Beucke participated in a number of corporate matters, including the initial board of directors' meeting on September 15, 1997 (RX 2), the board of directors' meeting on February 22, 2000 (RX 4), allowing himself to be authorized to draw funds on Bayside Produce, Inc.'s Bank of America account number 01719-21437 (RX 23), allowing himself to be authorized to draw funds on Bayside Produce, Inc.'s Community 'Bank of Central California account number 1361955 (RX 24 at 17), signing Bayside Produce, Inc,'s resolution to borrow from Community Bank of Central California (RX 24 at 18-25), purchasing produce on behalf of Bayside Produce, Inc. (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35), and deciding which Bayside Produce; Inc., debts to pay (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). The record indicates Petitioner Beucke failed to exercise authority consistent with his positions as 33 1/3 percent owner, a director, the secretary, and a vice president to

counteract or obviate the fault of others. That Petitioner Beucke chose not to take action to counteract or obviate the fault of others does not establish that his role was nominal.

In approximately August 1997, Petitioner Keyeski entered into an arrangement with Wayne Martindale and Petitioner Beucke with respect to Bayside Produce, Inc., that was "[b]asically a three-way partnership, . . . equal duties, equal opportunity, equal money, equal everything." (Tr. 358-59.) In February 2000, after Petitioner Keyeski invested $7,000 in Bayside Produce, Inc., Petitioner Keyeski attended a Bayside Produce, Inc., board of directors' meeting in which he became a vice president, a director, and holder of 33 1/3 percent of the outstanding shares of Bayside Produce, Inc. (RX 4; EX 6). Petitioner Keyeski's relationship to Bayside Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner Keyeski is an experienced, savvy individual who has worked in the produce business since 1985 or 1986, who has

worked for years with some or all of the principals in Bayside Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 33 1/3 percent owner does not serve in a nominal capacity.[16]

There is no evidence that Petitioner Keyeski was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, and a co-owner in an attempt to establish a profitable business. Petitioner Keyeski presumably would have shared in Bayside Produce, Inc.'s profits when there were some. Petitioner Keyeski participated in a number of corporate matters, including the board of directors' meeting on February 22, 2000 (RX 4), controlling all aspects of Bayside Produce, Inc.'s San Diego, California, office as general manager, except for depositing

[16] See note 15.

receivables and paying for purchases of produce (Tr. 364-65, 397), purchasing produce on behalf of Bayside Produce, Inc. (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44), and managing payroll and paying rent and other incidental expenses related to Bayside Produce, Inc.'s San Diego, California, operation (Tr. 364-65, 397). The record establishes Petitioner Keyeski resigned as director and officer of Bayside Produce, Inc., prior to Bayside Produce, Inc.'s violations of the PACA. However, Petitioner Keyeski retained his ownership of 33 1/3 percent of the outstanding stock of Bayside Produce, Inc., until March 2003 because of what Petitioner Keyeski believed to be its economic value (KK 1; Tr. 190-91). Moreover, Petitioner Keyeski continued his role as general manager of Bayside Produce, Inc.'s San Diego, California, office until December 13, 2002 (Tr. 364-65, 397). The record indicates Petitioner Keyeski failed to exercise authority consistent with his position as 33 1/3 percent owner to counteract or obviate the fault of others. That Petitioner Keyeski chose not to take action to counteract or obviate the fault of others does not establish that his role was nominal.

Petitioner Beucke's and Petitioner

Keyeski's Appeal Petitions

Petitioner Beucke and Petitioner Keyeski raise 12 issues in "Petitioner Beucke's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner Beucke's Appeal Petition] and "Petitioner Keyeski's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner Keyeski's Appeal Petition].

First, Petitioner Beucke and Petitioner Keyeski state the ALJ used an incorrect legal standard as the basis for his determination that they were responsibly connected with Bayside Produce, Inc. Specifically, Petitioner Beucke and Petitioner Keyeski assert the ALJ based his conclusion that they were responsibly connected with Bayside Produce, Inc., on the findings that Petitioner Beucke and Petitioner Keyeski were actively involved with Bayside Produce, Inc., when Bayside Produce, Inc., was committing violations of the PACA. (Petitioner Beucke's Appeal Pet. at 4, 14-15; Petitioner Keyeski's Appeal Pet. at 2, 4-5.)

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first prong of the responsibly-connected test, a petitioner must

demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. Petitioner Beucke and Petitioner Keyeski base their contention that the ALJ erroneously used an incorrect legal standard on the ALJ's findings that "Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA" and "Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA" (Initial Decision at 11). I do not find the ALJ's findings that Petitioner Beucke and Petitioner Keyeski were actively involved with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA indicates the ALJ applied an incorrect legal standard when concluding Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc.

The ALJ correctly cites section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as the statutory provision applicable in this proceeding (Initial Decision at 3). Moreover, the ALJ, citing *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1487-88 (1998), states the first prong of the two-prong test requires a petitioner to demonstrate by a

preponderance of the evidence that the petitioner was not actively involved in the activities resulting in a violation of the PACA (Initial Decision at 3-4). Finally, the ALJ cites case law relevant to the proper statutory standard. After reading the entire Initial Decision, I find the ALJ's findings that "Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA" and "Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA" (Initial Decision at 11) are merely the ALJ's shorthand manner of stating Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA and the ALJ applied the proper legal standard when concluding Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc.

Second, Petitioner Beucke and Petitioner Keyeski contend the facts established in the record do not support the ALJ's conclusion that Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Beucke and Petitioner Keyeski assert

the record supports the ALJ's finding that there is no evidence Petitioner Beucke or Petitioner Keyeski engaged in any affirmative action designed to leave suppliers unpaid. (Petitioner Beucke's Appeal Pet. at 4, 15-19; Petitioner Keyeski's Appeal Pet. at 2, 6-8.)

I agree with the ALJ's finding that the record does not contain evidence that Petitioner Beucke or Petitioner Keyeski engaged in activities designed to leave Bayside Produce, Inc.'s produce suppliers unpaid. However, evidence that a petitioner has not engaged in activities designed to leave produce suppliers unpaid is not sufficient to prove by a preponderance of the evidence that the petitioner was not actively involved in activities resulting in a violation of the prompt payment provision of the PACA. The record establishes that Petitioner Beucke and Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA.(Tr. 161-64, 167-68, 248-52, 300-05, 323-24; CX 16, CX 21, CX 23, CX 26, CX 28, CX 32, CX 33, CX 35, CX 41, CX 44). Purchasing produce when there are insufficient funds to pay for that

produce leads to a violation of the prompt payment provision of the PACA,[17] even if the person purchasing the produce fully intends to make full payment promptly in accordance with the PACA. The record also establishes that during the period November 23, 2002, through February 7, 2003, Petitioner Beucke signed checks on Bayside Produce Inc.'s Community Bank of Central California account (Tr. 239-40; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619), and during the period November 23, 2002, through December 13, 2002, Petitioner Keyeski was the general manager of Bayside Produce, Inc.'s San Diego, California, office. Petitioner Keyeski controlled all aspects of Bayside Produce, Inc.'s San Diego, California, operation, except for depositing receivables and paying for produce purchases. Petitioner Keyeski's duties included managing payroll and paying rent and other incidentals. By the payment of certain creditors, Petitioner Beucke and Petitioner Keyeski were in effect choosing which debts to pay; thus, Petitioner Beucke and Petitioner Keyeski were actively involved in

[17] *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488 (1998).

activities resulting in Bayside Produce, Inc.'s violations of the prompt payment provision of the PACA.[18]

Petitioner Beucke also argues that his circumstance is similar to that of the petitioner in *Maldonado* v. *Department of Agric.*, 154 F.3d 1086 (9th Cir. 1998), who the Court held was not responsibly connected with W. Fay, a company which had violated the PACA. However, the question in *Maldonado* was whether the petitioner, a putative officer of W. Fay, was only a nominal officer. Therefore, I find *Maldonado* inapposite to the question of Petitioner Beucke's active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA.

Third, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously concluded they were responsibly connected with Bayside Produce, Inc., based on the theory that Petitioner Beucke and Petitioner Keyeski failed to constrain Wayne Martindale's misconduct and that such failure resulted in Bayside Produce, Inc.'s PACA violations (Petitioner's Beucke's Appeal Pet. at 4,19-22; Petitioner Keyeski's

[18] *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1489 (1998).

Appeal Pet. at 8-9).

The ALJ states Petitioner Beucke's and Petitioner Keyeski's "failure ... to constrain and halt the misconduct of Wayne Martindale did leave suppliers unpaid." (Initial Decision at 7.) Based on that statement, I infer the ALJ concluded Petitioner Beucke's and Petitioner Keyeski's failure to constrain Wayne Martindale's misconduct constitutes active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. I disagree with the ALJ. Generally, active involvement in activities resulting in a violation of the PACA requires more than an act of omission.[19] While I disagree with the ALJ's assertion that Petitioner Beucke's and Petitioner Keyeski's acts of omission support the conclusion that Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA, I do not

[19] See generally In re Donald R. Beucke, __ Agric. Dec.____, slip op. at 22-23 (Sept. 28, 2006) (discussing the Judicial Officer's disagreement with the Chief Administrative Law Judge's assertion that the petitioner's acts of omission support the conclusion that the petitioner was actively involved in the activities resulting in violations of the PACA).

hold that an act of omission can never constitute active involvement in the activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Petitioner Beucke's and Petitioner Keyeski's acts of omission do not constitute active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA.

Fourth, Petitioner Beucke contends the ALJ erroneously concluded Petitioner Beucke was not a nominal officer, director, and shareholder of Bayside Produce, Inc., during the period November 23,.2002, through February 7, 2003, when Bayside Produce, Inc., violated the PACA (Petitioner Beucke's Appeal Pet. at 4, 23-26).

I agree with the ALJ's conclusion that Petitioner Beucke failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of Bayside Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the

violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.[20] The record establishes Petitioner Beucke had an actual, significant nexus with Bayside Produce, Inc., during the violation period.

During the period when Bayside Produce, Inc., violated the PACA, Petitioner Beucke owned 33% percent of the outstanding stock of Bayside Produce, Inc. Petitioner Beucke's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.[21] Petitioner Beucke has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Bayside Produce, Inc.

[20] See note 14.

[21] See note 15.

Moreover, Petitioner Beucke had the appropriate business experience to be a corporate officer and director. At the time of the October 2005 hearing, Petitioner Beucke had approximately 26 years of experience in the produce industry. Petitioner Beucke began working at Martindale Distributing Company. Petitioner Beucke started in Martindale Distributing Company as a field inspector and later progressing to the positions of buyer and broker. At one point, Petitioner Beucke was the president of Martindale Distributing Company and held 33 1/3 percent of the outstanding shares of Martindale Distributing Company. Petitioner Beucke was also the vice president and a holder of 20 percent of the outstanding stock of Garden Fresh Produce, Inc. (Tr.213-14, 218, 312-14.)

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.[22] In 1997, Petitioner Beucke, along with Wayne Martindale, founded Bayside Produce, Inc.

[22] *In re Donald R. Beucke*, ___ Agric. Dec. __, slip op. at 25 (Sept. 28, 2006); *In re Edward S. Martindale*, ___Agric. Dec. __, slip op. at 30 (July 26, 2006); In re *Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

Petitioner invested $7,000 in Bayside Produce, Inc., and became a 50 percent shareholder, a director, the vice president, and the secretary of the new company. Petitioner Beucke remained a stockholder, a director, a vice president, and the secretary until he submitted his resignation and reassigned his stock in April 2003.

(RX 1-RX 6; Tr. 222, 313-14.)

Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the prompt payment provision of the PACA (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35). Petitioner Beucke's name and signature appeared on the bank signature card for Bayside Produce, Inc.'s Bank of America account number 01719-21437, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003 (RX 23). Petitioner Beucke's name and signature appeared on the bank authorizations for Bayside Produce, Inc.'s Community Bank of Central California account number 1361955, and Petitioner Beucke was

authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003. During that period, Petitioner Beucke signed 20 checks on the account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow under loan number 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

Petitioner Beucke made decisions about which Bayside Produce, Inc., debts to pay. Petitioner Beucke became aware in December 2002 that Bayside Produce, Inc., was not making full payment promptly for produce (Tr. 72, 268-70). Even though Petitioner Beucke new Bayside Produce, Inc., was failing to pay for produce in accordance with the prompt payment provision of the PACA, Petitioner Beucke continued purchasing produce and issuing checks on Bayside Produce, Inc.'s Community Bank of Central California account.

In short, I find Petitioner Beucke had an

actual, significant nexus with Bayside Produce, Inc. Petitioner Beucke was a major stockholder of Bayside Produce, Inc.; Petitioner Beucke had the appropriate business experience to be a corporate officer and director; and Petitioner Beucke participated in corporate decision-making.

Fifth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to address their assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10).

I agree with Petitioner Beucke and Petitioner Keyeski that the ALJ did not address their assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States. However, I find, based upon the ALJ's disposition of the proceeding, the ALJ rejected Petitioner Beucke's and Petitioner Keyeski's assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the

Constitution of the United States. I find no purpose would be served by remanding this proceeding to the ALJ to address Petitioner Beucke's and Petitioner Keyeski's assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Sixth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude Respondent violated the Rules of Practice. Petitioner Beucke and Petitioner Keyeski contend Respondent failed, prior to instituting the formal disciplinary complaint against Bayside Produce, Inc., on April 26, 2004, to provide Petitioner Beucke and Petitioner Keyeski with written notice of the facts involved and to provide Petitioner Beucke and Petitioner Keyeski an opportunity to correct Bayside Produce, Inc.'s PACA violations, as required by section 1.133 of the Rules of Practice (7 C.F.R. § 1.133). (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10.)

Section 1.133(b)(3) of the Rules of Practice

provides that the administrator[23] attempt to effect settlement of proceedings, as follows:

> **§ 1.133 Institution of proceedings.**
>
> ....
>
> (b) *Filing of complaint or petition for review....*
>
> ....
>
> (3) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the

[23] The term administrator is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the administrator of the agency administering the statute involved or any officer or employee of the agency to whom authority has been delegated, or may be delegated, to act for the administrator. The statute involved in the administrative disciplinary proceeding instituted against Bayside Produce, Inc., is the PACA, and the administrator of the agency administering the PACA is the Administrator, Agricultural Marketing Service, United States Department of Agriculture.

> matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

7 C.F.R. § 1.133(b)(3).

As an initial matter, Respondent is not the Administrator, Agricultural Marketing Service, United States Department of Agriculture, and Respondent is not the United States Department of Agriculture employee who was delegated authority to institute the

disciplinary proceeding against Bayside Produce, Inc.[24] Therefore, even if I were to find Petitioner Beucke and Petitioner Keyeski were entitled to written notice of the facts regarding the

[24] The Chief Administrative Law Judge states *In re Bayside Produce, Inc.*, was instituted by a complaint filed on April 26, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1030 (2004).

disciplinary proceeding instituted against Bayside Produce, Inc., and an opportunity to demonstrate or achieve Bayside Produce, Inc.'s compliance with the PACA, I would not find Respondent responsible for providing Petitioner Beucke and Petitioner Keyeski with the notice and opportunity to demonstrate or achieve compliance, as Petitioner Beucke and Petitioner Keyeski assert.

Further, I find section 1.133(b)(3) of the Rules of Practice (7 C.F.R. § 1.133(b)(3)) inapplicable to the disciplinary proceeding instituted against Bayside Produce, Inc. The requirement in section 1.133(b)(3) of the Rules of Practice (7 C.F.R. § 1.133(b)(3)) that the administrator attempt to effect a settlement is not applicable to cases involving willfulness. The Chief Administrative Law Judge explicitly concluded that Bayside Produce, Inc., willfully violated the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)).[25] Therefore, I reject Petitioner Beucke's and Petitioner Keyeski's contention that Respondent failed to comply with section 1.133 of the Rules of

[25] In re Bayside Produce, Inc., 63 Agric. Dec. 1029, 1031 (2004).

Practice (7 C.F.R. § 1.133).

Petitioner Beucke and Petitioner Keyeski also contend Respondent failed to join the instant responsibly connected proceeding with the disciplinary proceeding instituted against Bayside Produce, Inc., as required by section 1.137 of the Rules of Practice (7 C.F.R. § 1.137) (Petitioner Beucke's Appeal Pet. at 31; Petitioner Keyeski's Appeal Pet. at 10).

Section 1.137(b) of the Rules of Practice requires the administrative law judge to consolidate for hearing any proceeding alleging a PACA licensee's violation of the PACA, with any petitions for review of determinations of responsible connection with that PACA licensee, as follows:

> **§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**
>
> ....
>
> (b) *Joinder.* The Judge shall consolidate for hearing with any .proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, any petitions for review of determination of status by the

> Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. § 1.137(b).

As an initial matter, Respondent was not the judge[26] in the disciplinary proceeding instituted against Bayside Produce, Inc. Therefore, even if I were to find the disciplinary proceeding instituted against Bayside Produce, Inc., and the instant proceeding were required to be consolidated for hearing, I would not find Respondent had any duty to consolidate the proceedings, as Petitioner Beucke and Petitioner

[26] The term judge is defined in section 1.132 of the Rules of Practice (7 C.F.R. §1.132) as any administrative law judge appointed pursuant to 5 U.S.C. §3105 and assigned to the proceeding involved.

Keyeski assert.

The Chief Administrative Law Judge issued a decision without hearing by reason of default in the disciplinary proceeding instituted against Bayside Produce, Inc., for violations of the payment provision of the PACA on August 25, 2004, and the decision became final on September 29, 2004.[27] Since the Chief Administrative Law Judge never conducted a hearing in the disciplinary proceeding instituted against Bayside Produce, Inc., I reject Petitioner Beucke's and Petitioner Keyeski's contention that In re Bayside Produce, Inc., 63 Agric. Dec. 1029 (2004), was required to be consolidated for hearing with the instant proceeding.

Further, Petitioner Beucke and Petitioner Keyeski contend Respondent failed to serve the proposed default decision in *In re Bayside Produce, Inc..*, on Petitioner Beucke and Petitioner Keyeski, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) (Petitioner Beucke's Appeal Pet. at 31-32; Petitioner Keyeski's Appeal Pet. at 10).

Section 1.139 of the Rules of Practice

[27] In re Bayside Produce, Inc., 63 Agric. Dec. 1029, 1031-32 (2004).

requires that the Hearing Clerk serve the respondent with any proposed default decision, as follows:

> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

7 C.F.R. § 1.139.

Respondent was not the Hearing Clerk[28] and Petitioner Beucke and Petitioner Keyeski were not the respondents[29] in the disciplinary

[28] The term *Hearing Clerk* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the Hearing Clerk, United States Department of Agriculture, Washington, DC 20250.

[29] The term *respondent* is defined in section 1.132 of the Rules of Practice (7.C.F.R. § 1.132) as the party proceeded against in *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029

proceeding instituted against Bayside Produce, Inc. Therefore, I reject Petitioner Beucke's and Petitioner Keyeski's contention that Respondent was required to serve Petitioner Beucke and Petitioner Keyeski with the proposed default decision filed in *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

Seventh, Petitioner Beucke and Petitioner Keyeski contend. the ALJ erroneously failed to conclude Respondent violated the due process clause of the Fourteenth Amendment to the Constitution of the United States (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10).

The due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[30] it is not a state. Therefore, as a matter of law, Respondent could not have violated the due process clause of the Fourteenth Amendment to the Constitution of the United

(2004), was Bayside Produce, Inc.

[30] See 5 U.S.C. §§ 101, 551(1).

States, as Petitioner Beucke and Petitioner Keyeski contend.[31]

Eighth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to address their assertion that any employment prohibition resulting from the instant proceeding began August 25, 2004, the date the Chief Administrative Law Judge filed *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004) (Petitioner Beucke's Appeal Pet. at 5, 33-36; Petitioner Keyeski's Appeal Pet. at 2, 10).

I agree with Petitioner Beucke's and Petitioner Keyeski's contention that the ALJ did not address their assertion that the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees began August 25, 2004. However, in accordance with the terms of the Initial Decision, the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees would have become effective as to Petitioner Beucke 35 days after service of the Initial Decision on Petitioner Beucke and as to Petitioner Keyeski 35 days after service of the

[31] *In re Glenn Mealman*, __ Agric. Dec. __, slip op. at 5 (Oct. 3, 2005) (Order Denying Pet. to Reconsider); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 303-04 (2005).

Initial Decision on Petitioner Keyeski had Petitioner Beucke and Petitioner Keyeski not appealed the ALJ's decision to the Judicial Officer (Initial Decision at 12). I find this effective date clearly establishes that the ALJ rejected Petitioner Beucke's and Petitioner Keyeski's contention regarding the timing of the employment bar, and I find no purpose would be served by remanding this proceeding to the ALJ to address Petitioner Beucke's and Petitioner Keyeski's timing issue.

Ninth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude that any employment prohibition imposed on Petitioner Beucke and Petitioner Keyeski began August 25, 2004, the date the Chief Administrative Law Judge filed *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004). Petitioner Beucke and Petitioner Keyeski argue the plain language of section 8(b) of the PACA (7 U.S.C. § 499h(b)) requires that the Secretary of Agriculture impose the employment prohibition on responsibly connected individuals beginning on the date the person with whom the individuals are responsibly connected is found to have violated the PACA. Thus, under Petitioner Beucke's and Petitioner Keyeski's reading of the

PACA, the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees began August 25, 2004, even though a final determination that Petitioner Beueke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., had not been issued. (Petitioner Beucke's Appeal Pet. at 5, 33-36; Petitioner Keyeski's Appeal Pet. at 2, 10.)

Petitioner Beucke's and Petitioner Keyeski's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would thwart the remedial purposes of the PACA. Using Petitioner Beucke's and Petitioner Keyeski's interpretation of the PACA, principals of a violating PACA licensee would, in many cases, avoid the employment bar because the period of employment bar would conclude before a determination is made that the principals were responsibly connected. The United States Court of Appeals for the Second Circuit stated that section 8(b) of the PACA (7 U.S.C. § 499h(b)) is designed to prevent circumvention of the PACA by forbidding responsibly connected persons from employment by PACA licensees, as follows:

> Legislative history indicates that Section 499h(b) was enacted in

> order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose licenses had been revoked and who, by the subterfuge of acting as an "employee" of a nominal licensee nevertheless continued in business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry.

Zwick v. *Freemall,* 373 F.2d 110, 118 (2d Cir.) (footnote omitted), *cert. denied,* 389 U.S. 835 (1967). Petitioner Beucke's and Petitioner Keyeski's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would result in the very circumvention of the PACA that section 8(b) of the PACA (7 U.S.C. § 499h(b)) was designed to prevent.

Petitioner Beucke and Petitioner Keyeski

cite two cases, *Frank Tambone, Inc.* v. *U.S. Dep't of Agric.*, 50 F.3d 52 (D.C. Cir. 1995), and *Farley and Calfee, Inc.* v. *U.S. Dep't of Agric.*, 941 F.2d 964 (9th Cir. 1991), in support of their argument that an employment bar must commence as soon as a PACA licensee is found to have violated the PACA. In *Tambone*, the Court addressed the timing of a license bar where a company had been without a license prior to the final determination that the company had violated the PACA, as follows:

> The Judicial Officer rendered his decision on February 2, 1994. By that time Tambone, Inc. already had been without a license for more than a year. The order has not yet become effective; publication will result in a prospective bar under § 499d(b)(B), preventing the company from obtaining a license for two years. The bar will run from the effective date of this publication order, which will occur after we render our decision here. Why the bar necessarily should be entirely prospective--why, in other words, the effective date cannot be made

> retroactive--is a matter the Judicial Officer did not address, doubtless because no one raised the point. Even before *S.S. Farms*, at least one ALJ made the effective date of a publication order retroactive. *See Farley & Calfee*, 941 F.2d at 966. But, as we have said, the point was not raised in the administrative proceedings and it has not been argued here.

Frank Tambone, Inc. v. U.S. Dep't of Agric., 50 F.3d 52, 56 n. † (D.C. Cir. 1995).

Tambone does not address the timing of an employment bar imposed on responsibly connected individuals. *Tambone* merely stands for the proposition that the bar on an applicant obtaining a PACA license runs from the effective date of a court order finding that the applicant has flagrantly or repeatedly violated the PACA. The Court declined to address the issue of retroactive application of the license bar. I find *Tambone* inapposite.

Farley and Calfee, Inc. v. U.S. Dep't of

Agric., 941 F.2d 964 (9th Cir. 1991), involved the application of the employment bar to an individual who had been determined to be responsibly connected with a company prior to the final determination that the company had violated the PACA. The instant proceeding involves the application of the employment bar to an individual who is determined to be responsibly connected with a company after the final determination that the company had violated the PACA. I find *Farley and Calfee* inapposite.

Tenth, Petitioner Beucke contends the ALJ failed to order Respondent to produce prior written and recorded statements of Respondent's witness, as required by the Rules of Practice (Petitioner Beucke's Appeal Pet. at 5, 36-45).

Section 1.141(h)(1)(iii) of the Rules of Practice provides that a party may request and obtain the production of any statement, or part of a statement, of a witness called by the complainant and in the possession of the complainant, as follows:

§ 1.141 Procedure for hearing.

....

(h) *Evidence--(1) In general.* ...

....

> (iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

7 C.F.R. § 1.141(h)(1)(iii). Petitioner Beucke seeks an investigation report written by Everet Gonzales and in the possession of Charles L. Kendall (Petitioner Beucke's Appeal Pet. at 39). The record clearly establishes that Evert Gonzales was a witness called by Respondent, not the complainant, and Charles L. Kendall represents Respondent, not the complainant (Tr. 2, 205, 405-06). Therefore, by its terms, section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141 (h)(1)(iii) is not applicable since it

provides that a party is entitled only to statements of a witness called by the *complainant* in the possession of the *complainant*.

Eleventh, Petitioner Keyeski contends the ALJ erroneously concluded, because Petitioner Keyeski was actively involved with Bayside Produce, Inc., he cannot be considered a nominal shareholder (Petitioner Keyeski's Appeal Pet. at 6).

The ALJ concludes "[b]y reason of his active involvement with Bayside, Petitioner Keyeski was not only nominally a ... shareholder of Bayside during the period November 23, 2002 to February 7, 2003" (Initial Decision at 12). I agree with the ALJ's conclusion that Petitioner Keyeski failed to prove by a preponderance of the evidence that he was only a nominal shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). In order for a petitioner to show that he or she was only nominally an officer, a director, or a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an

actual, significant nexus with the violating company during the violation period. Active involvement with a company is one indicator of an actual, significant nexus with that company. Here, the record establishes that Petitioner Keyeski participated in a number of corporate matters, including controlling all aspects of Bayside Produce, Inc.'s San Diego, California, office as general manager, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397), purchasing produce on behalf of Bayside Produce, Inc.(Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44), and managing payroll and paying rent and other incidental expenses related to Bayside Produce, Inc.'s San Diego, California, operation (Tr. 364-65, 397). I agree with the ALJ that active involvement of the nature displayed by Petitioner Keyeski is a basis for concluding that Petitioner Keyeski was not only nominally a shareholder of Bayside Produce, Inc.

Twelfth, Petitioner Keyeski contends the ALJ erroneously found that he (Petitioner Keyeski) was a shareholder of Bayside Produce, Inc., until March 11, 2003. Petitioner Keyeski asserts the record establishes that he ceased being a shareholder of Bayside Produce, Inc.,

November 8, 2002. (Petitioner Keyeski's Appeal Pet. at 9-10.)

I disagree with Petitioner Keyeski's contention that the record establishes that he ceased being a shareholder of Bayside Produce, Inc., on November 8, 2002. While Petitioner Keyeski testified that he did not consider himself an owner of Bayside Produce, Inc., after November 8, 2002, and introduced some evidence to indicate that by December 18, 2002, he was no longer a stockholder of Bayside Produce, Inc. (Tr. 380; KK 8), the preponderance of the evidence supports the ALJ's finding that Petitioner Keyeski retained his shares of Bayside Produce, Inc., until March 2003 (KK I, KK 2; Tr. 190-96). Therefore, I reject Petitioner Keyeski's contention that the ALJ erroneously found Petitioner Keyeski was a shareholder of Bayside Produce, Inc., until March 11, 2003.

Findings of Fact

1. Bayside Produce, Inc., is a California corporation, incorporated on August 6, 1997. Bayside Produce, Inc., applied for and received PACA license number 19981824. Bayside Produce, Inc., annually renewed PACA license number 19981824 on or before its annual

anniversary date through 2002 for the year ending August 26, 2003. (RX 1,RX 2.)

2. Bayside Produce, Inc.'s shareholders and directors consisted of Wayne Martindale and Petitioner Beucke, with each of them owning 50 percent of the shares of outstanding stock until February 22, 2000, when Bayside Produce, Inc., amended its bylaws to increase the number of directors from two to three and added Petitioner Keyeski as an equal shareholder, an officer, and a member of the board of directors (RX 4; EX 6).

3. Chief Administrative Law Judge Marc R. Hillson found that Bayside Produce, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to timely pay $163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period November 23, 2002, through February 7, 2003 (CX 1; RX 22).

4. Petitioner Beucke has significant experience with over 26 years in the produce industry and has owned, and held positions as a corporate officer in, two other produce companies, in addition to Bayside Produce, Inc. Petitioner Beucke was listed on Bayside Produce, Inc.'s PACA license and PACA license certificate

as a vice president, the secretary, a director, and a 33% percent shareholder during the period November 23, 2002, through February 7, 2003. Petitioner Beucke's signature appears on the minutes of Bayside Produce, Inc.'s initial board of directors' meeting on September 15, 1997, the stock certificate issued in his name, and the minutes of Bayside Produce, Inc.'s board of directors' February 22, 2000, meeting. (Tr, 213-14, 218, 312; RX 1-RX 4; CX 9-CX 12.)

5. Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which the suppliers of the produce were not paid (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35).

6. Petitioner Beucke's name and signature appeared on the bank signature card for Bayside Produce, Inc.'s Bank of America account number 01719-21437, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003 (RX 23).

7. Petitioner Beucke's name and signature appeared on the bank authorizations

for Bayside Produce, Inc.'s Community Bank of Central California account number 1361955, and Petitioner Beueke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003. During that period, Petitioner Beucke signed 20 checks on Bayside Produce, Inc.'s Community Bank of Central California account, including two checks payable to himself (Tr. 239-40;RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619).

8. Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow under loan number 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

9. By letter dated April 30, 2003, from his attorney, Lester W. Shirley, to Wayne Martindale, Petitioner Beucke tendered his resignation as a director and vice president of Bayside Produce, Inc., as well as from any position of employment with Bayside Produce, Inc. (RX 1 at 2; CX 6).

10. On October 23, 2003, Petitioner

Beucke executed documents entitled "Resignation and Acknowledgment of Stock Redemption" and "Stock Assignment Separate From Certificate," both of which purported to be effective April 4, 2003 (RX 5, RX 6; CX 7).

11. Petitioner Keyeski has been involved in the produce business since 1985 or 1986, starting first in the warehouse before moving into sales. From sometime in 1990 until July of 1997, Petitioner Keyeski was the sales manager of Coast Citrus Distributors, a San Diego, California, company. (Tr. 357, 393.)

12. Starting in approximately August 1997, Petitioner Keyeski joined Bayside Produce, Inc., in an arrangement with Wayne Martindale and Petitioner Beucke that was "basically a three-way partnership,... equal duties, equal opportunity, equal money, equal everything." (Tr. 358-59,)

13. Once he managed to accumulate the necessary $7,000 investment on February 22, 2000, Petitioner Keyeski attended a Bayside Produce, Inc., board of directors' meeting in Salinas, California, and became a 33% percent shareholder, vice president, and director of Bayside Produce, Inc. (KK 6; Tr. 368).

14. Petitioner Keyeski ran the San Diego, California, office of Bayside Produce, Inc., as a general manager, controlling all aspects of its operation, including managing the payroll and paying the rent and other incidental expenses, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397).

15. Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., on at least four occasions during the period November 23, 2002, through February 7, 2003, for which suppliers of the produce were not paid (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44).

16. By letter dated October 18, 2002, Petitioner Keyeski confirmed his verbal notice of October 8, 2002, that he was resigning as vice president and as a director of Bayside Produce, Inc., and that, effective December 31, 2002, he would be resigning all positions at Bayside Produce, Inc, Petitioner Keyeski verbally amended the effective date of his resignation from all positions at Bayside Produce, Inc., to December 13, 2002. (Tr. 375; KK 5; EX 5.)

17. Petitioner Keyeski retained his shares in Bayside Produce, Inc., until March 3, 2003, when he executed a document entitled

"Declaration of Lost Stock and Assignment of Shares," which was forwarded to Bayside Produce, Inc., by letter dated March 11, 2003 (Tr. 386; KK 1, KK 2; EX 8).

Conclusions of Law

1. During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to 22 produce sellers for 74 lots of perishable agricultural commodities, in the total amount of $163,102.70. *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

2. Petitioner Beucke was the vice president, the secretary, a director, and a holder of 33 1/3 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003.

3. Petitioner Beucke failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period November 23, 2002, through February 7,

2003.

4. Petitioner Beucke failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner Beucke failed to prove by a preponderance of the evidence that he was not an owner of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner Beucke was *responsibly connected,* as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

7. Petitioner Keyeski was a holder of 33 1/3 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003.

8. Petitioner Keyeski failed to prove by

a preponderance of the evidence that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period November 23, 2002, through February 7, 2003.

9. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was only nominally a shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

10. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was not an owner of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

11. Petitioner Keyeski was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

For the foregoing reasons, the following Order should be issued.

ORDER

1. I affirm Respondent's August 13, 2004, determination that Petitioner Keyeski was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4). Accordingly, Petitioner Keyeski is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner Keyeski.

2. I affirm Respondent's August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Beucke is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner Beucke.

RIGHT TO JUDICIAL REVIEW

Petitioner Beucke and Petitioner Keyeski have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner Beucke and Petitioner Keyeski must seek judicial review within 60 days after entry of the Order in this Decision and Order.[32] The date of entry of the Order in this Decision and Order is November 8, 2006.

Done at Washington, DC
November 8, 2006

/s/ William G. Jenson
William G. Jenson
Judicial Officer

[32] 28 U.S.C. § 2344.

August 6, 2008 Decision By Ninth Circuit
Court of Appeals.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 06 2008

MOLLY C. DWYER. CLERK

U.S. COURT OF APPEALS

DONALD R. BEUCKE, Petitioner, v. UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES OF AMERICA, Respondents.	No. 06-75358 AGRI No. 04-0009 MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3

DONALD R. BEUCKE, Petitioner, v. UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES OF AMERICA, Respondents.	No. 07-70033 AGRI No. 04-0014

On Petition for Review of an Order of the Department of Agriculture

Argued and Submitted July 17, 2008
San Francisco, California

Before: W. FLETCHER and TALLMAN, Circuit Judges, and BERTELSMAN,** District Judge.

** The Honorable William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

Donald Beucke petitions for review of the decisions of the Secretary of Agriculture affirming the administrative law judge's decision that he was "responsibly connected" to Garden Fresh Produce and to Bayside Produce. The Secretary had found that those companies had violated 7 U.S.C. § 499b(4), a provision of the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. §§ 499a-499s, by failing to pay produce suppliers. Beucke also alleges a series of procedural errors by the Secretary over the course of the administrative hearings.

We "'review final decisions in PACA cases under the deferential standard of the [APA]. Under that standard, we must "uphold the Judicial Officer's decision unless we find it to be arbitrary capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence."'" *Kleiman & Hochberg, Inc. v. Dep't of Agric.*, 497 F.3d 681, 686 (D.C. Cir. 2007) (citations omitted). Agency factual findings are reviewed under the substantial evidence test. *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971). This review means that the record must support an agency determination in the form of "such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

We review for abuse of discretion agency decisions regarding the production of a report pursuant to the Jencks Act. *Blackfoot Livestock Comm'n v. Dep't of Agric.*, 810 F.2d 916, 923 (9th Cir. 1987). We review de novo due process claims relating to administrative proceedings. *Carpenter v. Mineta*, 432 F.3d 1029, 1032 (9th Cir. 2005).

We first conclude that the Judicial Officer's ("JO") decision that Beucke was "responsibly connected" to Bayside Produce was supported by substantial evidence; Beucke did not rebut the presumption created by his 33-1/3 percent ownership of the company. *See* 7 U.S.C. § 499a(b)(9)(B) (providing that an individual is presumed to be responsibly connected if serving as an "officer, director, or holder of more than 10 per centum of the outstanding stock" of the violating company). First, Beucke did not "demonstrate[] by a preponderance of the evidence that [he] was not actively involved in the activities resulting in" the PACA violation. *Id.* § 499a(b)(9). Instead, he purchased produce on more than 30 occasions during the violations

period. Second, Beucke did not demonstrate that he was only "nominally a partner, officer, director, or shareholder" of Bayside Produce. *Id.* Instead, Beucke had a stock certificate issued in his name; attended the formal Bayside Produce meetings; was authorized to draw funds on Bayside Produce's bank accounts; and signed 20 checks for Bayside Produce during the violations period.

In contrast, we conclude that the JO's decision that Beucke was responsibly connected to Garden Fresh Produce was not supported by substantial evidence. Instead, Beucke successfully rebutted the presumption created by his 20 percent ownership interest in the company. Beucke demonstrated that he was not "actively involved" in the transactions forming the basis for the PACA violation. *See Maldonado v. Dep't of Agric.*, 154 F.3d 1086, 1087-88 (9th Cir. 1998). The JO found that "[t]he record does not contain evidence that Petitioner was directly involved in any of the transactions" for which Garden Fresh had been held liable. Indeed, the produce suppliers consistently testified that Beucke had an impeccable reputation in the produce business. Further, Beucke demonstrated that he was only nominally an

officer of Garden Fresh and "lacked any 'actual, significant nexus with the violating company[.]'" *Id.* at 1088 (citations omitted). Beucke had no duties or responsibilities in his named roles; did not attend the organizational meeting or subsequent formal company meetings; received only nominal pay ($1,500) in the company's first year; and signed no checks within the violations period. Because we so hold, we need not address Beucke's contention that the agency violated his due process rights when using evidence from another individual's hearing to support its finding that Beucke was responsibly connected to Garden Fresh.

We also conclude that the JO did not abuse its discretion in holding that the licensing and employment restrictions on Beucke pursuant to 7 U.S.C. §§ 499d(b) and 499h(b) did not begin running upon the ALJ's decision in his case or in the related underlying cases against Garden Fresh and Bayside. The JO relied on sources such as PACA Rule, 7 C.F.R. § 1.142(c)(4) (providing that ALJ decisions are not final if "there is an appeal to the Judicial Officer), and on the remedial purposes of the PACA. The fact that the agency potentially could have chosen to make the date retroactive does not mean that it

was required to do so, given the Secretary's discretion to "fashion[] ... an appropriate and reasonable remedy[.]" *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *see also Frank Tambone, Inc. v. Dep"t of Agric.*, 50 F.3d 52, 54-56 (D.C. Cir. 1995).

Beucke also objects to the agency's refusal to provide him with a copy of a report referred to during one of his administrative hearings. He relies on the PACA Rules of Practice for Disciplinary Hearings, 7 C.F.R. § 1.141 (h)(1)(iii), which requires the production of certain documents in conformity with the Jencks Act, 18 U.S.C. § 3500. *Norinsberg Corp. v. Dep't of Agric.*, 47 F.3d 1224, 1128 n.3 (D.C. Cir. 1995). We do not reach the question of whether the agency abused its discretion in not compelling the production of the investigative report. Even if there were a Jencks Act error, it was harmless, because the Secretary did not base its responsibly connected decision on information in the report. *Blackfoot*, 810 F.2d at 923.

Beucke points to other due process violations, but he had no right to any of the procedures to which he points. *Cf. Kleiman*, 497 F.3d at 691 n.7.

The petition for review is **DENIED** in Case No. 07-70033 and **GRANTED** in Case No. 06-75358. Each party shall bear its own costs.